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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1351

HARRY S. STONEHILL and ROBERT P. BROOKS,
Petitioners,
v.
UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HANS A. NATHAN
BERT B. RAND
1730 K Street, N. W.
Washington, D. C.

JOSEPH A. BALL
120 Linden Avenue
Long Beach, California

Counsel for Petitioners

Of Counsel:

JOHN L. INGOLDSBY, JR.
918 16th St., N. W.
Washington, D. C.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 9, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court [D.C. C.D. Calif., Hon. Harry C. Westover, J.], printed in Appendix A hereto, *infra,* pp. 31a to 42a, is reported at 274 F. Supp. 420.

The opinion of the Circuit Court of Appeals,* printed in Appendix A hereto, *infra*, pp. 1a to 15a, is reported at 405 F.2d 738. The dissenting opinion by Hon. James R. Browning, Circuit Judge, Appendix A, *infra*, pp. 16a to 30a, is reported *ibid.*, beginning at p. 747.

JURISDICTION

The Judgment of the Circuit Court (on appeal pursuant to 28 U.S.C. § 1292(b) from an Interlocutory Order of the United States District Court for the Central District of California) was entered on December 9, 1968. A timely Petition for Rehearing was denied on February 4, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether the silver platter doctrine outlawed by this Court in *Elkins* v. *U. S.*, 364 U.S. 206, 80 S.Ct. 1437 (1960) may be revived with the effect of depriving two million American citizens living abroad of the protection of the Fourth and Fifth Amendments of the Constitution in federal court proceedings.

2. The second question presented is whether evidence must be excluded in a federal court in an action brought by the United States against its citizen where such evidence was obtained by U.S. agents permanently stationed abroad, from foreign police officials who illegally seized it through searches which have been held to be in violation of the foreign country's Consti-

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* By Hon. Robert C. Belloni, D.J., D. of Oregon, sitting by designation, with Hon. Richard H. Chambers, C.J.

tution, and, if conducted in the United States, in violation of the U.S. Constitution; or whether such evidence need not be excluded, "so long as Federal officers did not participate too much" in the searches and seizures.

3. The third question presented is whether, as a matter of law, the rights of United States citizens under the Fourth and Fifth Amendments to the United States Constitution were violated, requiring exclusion, where both trial and appellate courts found that:

(1) searches conducted in a foreign country in the homes and offices of United States citizens permanently residing there, would have been unlawful if conducted in the United States;

(2) the searches were held to have been unlawful by the Supreme Court of the foreign country under a constitutional provision of the foreign country patterned after the Fourth Amendment to the U.S. Constitution;

(3) American Revenue agents stationed abroad brought the case to the attention of foreign police officials and persuaded their informer to meet with the foreign police;

(4) planning and preparation of the illegal searches and seizures took place at ten to twelve meetings conducted at the home of the U.S. agent, with the agent attending the meetings;

(5) documents detailing places to be searched and things to be seized were prepared by a U.S. agent and used by the foreign police;

(6) a location to be raided was selected solely by the U.S. agent and then included in the searches;

(7) prior to the searches, an agreement was made between U.S. and foreign officials permitting the U.S. agents to examine and copy records after seizure;

(8) U.S. agents were present at the premises during the searches and selected significant books and records for seizure;

(9) U.S. agents inspected still another location and pointed out a records storage space to be searched; and

(10) after the searches and seizures, the U.S. agents, pursuant to pre-seizure agreement, inspected and copied the evidence in premises made available to them at foreign police headquarters.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fifth Amendments, U.S. Constitution:

"Amendment IV—Searches and Seizures

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the Republic of the Philippines:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

—Section 1, paragraph 3, Article III

STATEMENT OF THE CASE

The United States in January of 1965 (relying on 28 U.S.C., Sections 1340, 1345 and 26 U.S.C., Sections 7401, 7402, 7403 for jurisdiction), filed a complaint in the U.S. District Court for the Central District of California, seeking foreclosure of Federal tax liens against certain properties in which Petitioners Harry S. Stonehill and Robert P. Brooks have an interest. Petitioners' tax liability was put in issue and Petitioners moved to suppress certain evidence obtained in violation of their constitutional rights by searches and seizures conducted in the Republic of the Philippines, where Petitioners resided.

The District Court held a hearing on the motion to suppress. It later entered its written order and opinion

denying the motion. (App. A, *infra*, p. 31a, 274 F. Supp. 420). Subsequently and without objection by the United States, the trial court granted a Certificate under 28 U.S.C. 1292(b). Petitioners were granted permission by the Court of Appeals for the Ninth Circuit to appeal, which Court affirmed the trial court's holding, Hon. James R. Browning dissenting, (405 F.2d 738). After denial of a timely Petition for Rehearing, this Petition follows.

There is no dispute as to the basic illegality of the searches and seizures. The Philippine Supreme Court has held that the raids, searches and seizures violated a provision of the Philippine Constitution,* adopted verbatim from the Fourth Amendment of the U.S. Constitution and both lower courts have found that the searches and seizures would have been unlawful had they been conducted in the United States.

There is little, if any, dispute as to the material facts:**

Petitioner Stonehill, subsequent to World War II, and Petitioner Brooks since birth, were residents of Manila, Republic of the Philippines. Both are United States citizens by birth. During the sixteen years preceding the events in issue, they were successful and respected businessmen in the Philippines and officers and directors of various corporations, among them U.S. Tobacco Company, a cigarette manufacturing concern.

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* Section 1, paragraph 3, Article III (see p. 5, supra).

** Official U.S. Government documents and the sworn testimony of the U.S. Internal Revenue Representative Chandler, are the primary source for this statement of facts.

The U.S. Internal Revenue Service, through its Office of International Operations, for many years has stationed representatives abroad to exercise the full power and tax jurisdiction of the United States over all American taxpayers residing there permanently or temporarily. Robert Chandler, the Internal Revenue Representative for the Far East, at the time involved herein, was head of the IRS office in Manila.*

The Internal Revenue Service was interested in Stonehill since 1954 (Gov. Exh. 11, line 1) and in 1960, Chandler was asked by Washington to audit Petitioner Stonehill's 1958 tax return, but declined to undertake the audit for lack of staff (Def. Exh. A; RT** 84). However, both in Washington and in Manila, files were accumulated relating to Petitioner Stonehill.

In December of 1961, a disgruntled employee of U.S. Tobacco Company, Menhart Spielman, as an informer for reward, contacted and thereafter repeatedly conferred with the United States CIA representative, the Consul General, FBI Agent Hawley, and IRS Agent Chandler at the Manila Embassy [RT 97-99, 107-112, 735; Exh. 11].

For the next three weeks, the FBI agent and the IRS agent intensively interrogated Spielman at Chandler's office or the informer's home (RT 112-113, 122, 126).

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* Similarly, agents of the FBI are attached to several U.S. Embassies as "legal attaches". The Legal Attache in Manila in 1962 was Robert Hawley.

** [RT—Reporter's Transcript of hearing on the motion].

An official dispatch* was sent on January 10, 1962 from the United States Embassy in Manila to the Department of State and the IRS office in Washington [Exhibit E] from which it conclusively appears that the Philippine searches and seizures which followed were the result of official U.S. Government policy and action. This document was sealed by the trial court in order "not to embarrass the United States".** It stated *in haec verba* that after discussions among Embassy personnel (including the economic attache), the highest ranking officer of the United States Embassy in Manila, Minister Mein decided on January 9, 1962 that the Embassy wanted "to get Stonehill out of the Philippines, [and] to keep him out". Chandler added that the IRS badly needed "publicized case action to create an effective and necessary enforcement image [in the Far East] and that Petitioner Stonehill's case [was] the best case for this purpose."

In Chandler's opinion, however, the case was "going to be really tough to work successfully" and "highly qualified and specialized agents" were needed in Manila to assist him.

The January 9 decision by the Embassy to have Stonehill removed permanently from the Philippines and to develop a widely-publicized tax case to improve the IRS enforcement image could not be put into effect without the use of Philippine law enforcement

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* Prior to the hearing on the motion, discovery of Government documents relating to the background of the searches and seizures was strongly resisted by the plaintiff and consistently denied by the court. Only at the trial itself a few of the great number of Government documents were ordered produced.

** Leave to quote from and reprint the dispatch in this Petition was granted on April 28, 1969 and the document is reproduced in Appendix "C" on page 74a, *infra*.

agencies, because of the lack of effective subpoena power. Chandler told Washington that IRS alone could do nothing further and could not accomplish Stonehill's permanent removal as desired by the Embassy. [Exh. E *infra*, App. C, p. 74a]. The reluctant Spielman was persuaded by Chandler and Hawley to meet with Philippine officials at a three-hour secret meeting at the U.S. Embassy on January 27 [RT 139-141].

On February 1, at another secret meeting in a private club, Chandler asked the newly-appointed Philippine Secretary of Justice, Diokno, for help. He advised Diokno that he probably could make a U.S. tax case against Petitioners but that he did not have enough evidence to proceed [RT 158-159].

Prior to Chandler and Hawley having succeeded in persuading Spielman to meet with the NBI, the Philippine government was not conducting any investigation against Petitioners. Only after Spielman had told his story, Colonel Lukban promised (according to Chandler's own testimony), that "he *would* inquire into it and that if Mr. Spielman's story was found to be correct, he *would* investigate" [RT 143].

After Lukban reported the Spielman story to the newly appointed Secretary of Justice Diokno, the Secretary took a firm position that he would not "stick his neck out . . . and go into this", unless the U.S. would go aggressively into it. [RT 161—Testimony of U.S. Agent Chandler]. Again, according to Chandler, Secretary Diokno wanted personal assurance from Attorney General Kennedy to that effect [RT 162]. Diokno's personal assistant, his "right arm", Major del Rosario, testified at the hearing below that the Philippine government entered the case primarily for the purpose of "helping the U.S. agents in developing

their tax case" [RT 836] and that the Philippine government was not interested in making any tax case at all.*

Both Chandler and Hawley made an effort to arrange the meeting with Attorney General Kennedy in Hong Kong which Diokno required [RT 205, 210, 984]. A date was set [RT 164] but before leaving, Diokno left instructions that no action be taken by Philippine officials until his return. His personal aide testified that, ". . . whatever action [was taken] was dependent on the outcome of his trip to Hong Kong" [RT 841]. According to Chandler, raids were discussed in Hong Kong by Diokno with a member of Kennedy's staff [RT 167]. An official U.S. government cable shows that during this meeting with a Kennedy assistant in Hong Kong, Diokno agreed to proceed with raids; but even then he would not proceed "through ordinary Philippine government channels" [Exh. AZ].

Between February 1 and February 12, in anticipation of a U.S.-Philippine agreement, there were daily meetings at the home of I.R.S. Agent Chandler between the U.S. agents, Spielman and Philippine agents. The latter included the Director and Deputy Director of the Philippine National Bureau of Investigation (NBI),** Messrs. Lukban and Nocon. They were held for the primary purpose of planning and preparing for the upcoming searches and seizures [RT 149, 278-280]. At these meetings, I.R.S. Agent Chandler advised the NBI personnel of the various types of financial records

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* After the raids Diokno was asked to resign by the President of the Philippines. Then Diokno attempted to have the U.S. make good on their promise of backing by interceding with the President on his behalf [RT 880].

** (Patterned after, and trained by the United States F.B.I.).

and documents which the United States Internal Revenue Service was interested in, i.e., vouchers, accounting sheets and books of account, to make an American "net worth" tax case against Petitioners [RT 316, 847, 848].

While the U.S. Government's declared official intention since early January was to have Petitioner Stonehill deported from the Philippines (Exhibit E), the Philippine Government first accepted the idea of deportation proceedings some time in February of 1962 [RT 197]. According to Chandler's testimony, deportation was first mentioned by Diokno at Chandler's house a week after their secret February 1 meeting at the Colombian Club. Diokno conceived a deportation proceeding only as a pretext to make sure that Petitioner Stonehill could not obtain bail.* [RT 198, 199]

Immediately after receipt of a cable reporting the U.S.-Diokno agreements of February 12, 1962, the requested IRS agents were dispatched to Manila from Washington. According to the testimony of Philippine Department of Justice aide Del Rosario, the raids were originally scheduled for February 24, 1962 but were postponed until March 3, 1962, for the sole reason that the agents who were coming from the U.S. to help agent Chandler had not arrived [RT 843, 844]. U.S. Agent Chandler admitted that he requested the delay

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* The District Court's finding of pre-existing Philippine deportation proceedings (274 F. Supp. 421) is clearly erroneous. The search warrants issued on March 3 (Exhibits M to Z, AA, et seq.), did not mention deportation nor were they issued by the Deportation Board; they made no reference to deportation proceedings. On the contrary, according to Philippine Department of Justice official del Rosario, actual deportation proceedings were initiated only on March 3, 1962. [RT 852, 853]

until U.S. agents could arrive [RT 286], that Agent Ragland did arrive on February 26 and that he then instructed Ragland and a local resident U.S. Agent to prepare for the raids. [RT 271, 272]

IRS Agent Chandler's home had become the headquarters for the entire raid planning; Diokno visited there [RT 197, 199] and the NBI, which was wiretapping Petitioners' telephones, brought current recordings of wiretapped conversations to Chandler's home, where they were played and listened to by Chandler and the NBI agents [RT 149-150].

Prior to the raids, Chandler prepared detailed written instructions and a location map as to where to search and what to seize [Exhs. I, J]. They are reproduced in Appendix "C", *infra,* (at pages 77a and 78a).* Chandler admitted in his testimony that all of Exhibit I was in his handwriting and that most of Exhibit J was in his handwriting [RT 349, 360; 862, 866-867]. The testimony shows that the instructions were scrupulously followed by the Philippine agents.

On February 26, after the first specially dispatched IRS Agent (Ragland) arrived in Manila to assist Chandler [RT 990], he was instructed to familiarize himself with the case and to obtain photographic equipment to copy documents to be seized in the raids [RT 271-272]. As of that time Chandler had already reached an explicit agreement with NBI Director Lukban, whereby all documents to be seized in the raids would be made available to the U.S. IRS agents for inspection and copying [RT 271, 923].

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* "Confiscate records", "Baltazar's office to be taken apart in detail", "check cigarette cases", "check dummy wall", are some of the search instructions in Chandler's handwriting reflected on these exhibits.

On March 2, a briefing session for the NBI team leaders was held in Colonel Lukban's home. Agent Chandler attended [RT 300-304]. He reviewed and approved the contents of the search warrants which were then being typed. More important, Chandler and Chandler alone selected a room at the Army-Navy Club (not originally on the list) as an additional location to be searched. But for Chandler's direction, this location would never have been searched [RT 305, 306, 308, 311-316, 346, 1008-1011]. The trial court stated on the record that this selection of the room in the Army-Navy Club by IRS Agent Chandler is "at least one example of a participation" [RT 1196].

At approximately 1:00 P.M. on March 3, 1962, Petitioners were arrested and the raids commenced [RT 397-399]. Three IRS agents, under the leadership of Chandler, armed with pencils, paper and copying equipment, were stationed behind the NBI building in accordance with prior arrangements with Director Lukban [RT 280-282, 387]. While the raids were in progress, they left and personally participated in the searches and assisted in the selection of documents to be seized, with the consent of Director Lukban and at his request.

The U.S. agents went to a warehouse of the U.S. Tobacco Company while it was being searched by NBI agents. According to Chandler's testimony, he and two agents went through the records and segregated what they thought might be important "from an accounting point of view" [RT 1020-1022]. The U.S. agents selected "ledgers, the important records books" put them into a box and directed that they be taken to NBI headquarters. Fully aware of the illegality of his presence, Chandler responded to an inquiry as to whether he was an FBI man, "Don't say that, little girl, don't say that word, little girl" [RT 646].

At Chandler's initiative, the U.S. agents then left the warehouse and immediately went to the main office of the U.S. Tobacco Co. where NBI agents were still searching [RT 413, 414, 1024, 1025]. Agent Chandler testified that he entered the building and asked the NBI agent in charge if he had found certain records stored behind the main office; and when the NBI agent seemed unfamiliar with the location, Chandler went up into the building and physically pointed out the area to be searched [RT 415, 1025]. The NBI followed his instructions.

There can be no doubt why the U.S. agents helped to select documents of importance for the U.S. tax case. They had a prior agreement that these documents would be turned over to them. Chandler, under direct examination by Government Counsel, testified:

> Gov't Counsel: "You already had an agreement with Colonel Lukban that he would give you records?"
>
> Mr. Chandler: "Colonel Lukban had indicated that he would make the things available to us." [RT 1005].

The agreement was scrupulously honored: at 8:30 A.M. on Monday, March 5, 1962, U.S. IRS Agents Ragland and Reynolds established themselves at NBI headquarters and began the monumental task of inspecting hundreds of thousands of seized documents from which they culled some thirty thousand documents, which provide the sole basis for the institution of this case [RT 1037, 1153].

Both the Trial Court and the majority of the Appellate Court appear to de-emphasize or gloss over the predominant role played by U.S. officials in arranging

for, planning and executing the illegal searches, as set out above. But, as Circuit Judge Browning stresses in his dissent: Even accepting the findings of the District Court as supplemented by the majority . . ., the American agents contributed to the unlawful enterprise in at least the respects recited in this statement of facts.

On June 19, 1967, the Supreme Court of the Philippines, in an unanimous opinion, held that the searches and seizures of March 3, 1962 were illegal and violated the Philippine constitutional guaranty against unreasonable searches and seizures, which is identical to the Fourth Amendment to the United States Constitution. [Exh. AW, 20 Phil. Sup. Ct. Rpts., Ann. 383 (1967): App. B, *infra,* 45a, *et seq.*].

The Trial Court held that the searches and seizures of March 3, 1962 were illegal under United States constitutional standards (274 F. Supp. 420, 424). So did the Court of Appeals, (405 F.2d at 743). But, despite finding the more than a dozen incidents of U.S. physical involvement and participation* in the flagrant violations of Petitioners' constitutional rights, the U.S. District Court for the Central District of California refused to exclude the illegally procured evidence and was affirmed by a majority of the Court of Appeals.

This petition follows.

REASONS FOR GRANTING THE WRIT

The District Court's denial of Petitioners' motion to suppress was based on the Ninth Circuit's special treatment of evidence illegally seized by foreign officials under *Brulay* v. *U. S.*, 383 F.2d 345 (C.A. 9, 1967) cert. denied, 389 U.S. 986 (1967). The Ninth Circuit

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* Set out in margin on pp. 19, 20, *infra.*

affirmed, finding that the Fourth Amendment exclusionary rule is inapplicable to acts of foreign officials and that the federal agents here involved had not "so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials". (405 F.2d at 743).

The decision of the Court of Appeals is in conflict with prior decisions of this Court and with decisions of the other circuits. If upheld, over two million American citizens living abroad would become second-class citizens, stripped of the constitutional protection in Federal courts enjoyed by their fellow citizens, solely because of their place of residence.

a. THE ACTS FOUND BY THE LOWER COURTS TO HAVE BEEN COMMITTED BY THE FEDERAL AGENTS IN THIS CASE CONSTITUTE "PARTICIPATION" AS A MATTER OF LAW, THUS REQUIRING EXCLUSION.

In holding that the United States government may bring action against Petitioners in a Federal Court and use the illegally seized evidence free from any Fourth Amendment restraint, the Ninth and, to a limited extent, the Fifth Circuit* are reviving the silver platter doctrine of *Lustig* v. *U. S.*, 338 U.S. 74, 69 S. Ct. 1372 (1949). Under this doctrine evidence obtained by Federal officers "on a silver platter" from State officers was admissible in a Federal trial court unless one of the purposes of the search was to obtain evidence of a federal offense, *Gambino* v. *U. S.*, 275 U.S. 310, 48 S.Ct. 137 (1927), [i.e., the search was instigated by federal officers or conducted for federal purposes], or unless federal officers participated in the search. *Lustig* v. *U. S., supra; Byars* v. *U. S.*, 273 U.S. 28, 47 S.Ct. 248 (1927).

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* *Birdsell* v. *U.S.*, 346 F. 2d 775 (1965).

Joint Venture or "Substantial" Participation Not Required for Exclusion

In attempting to revive the silver platter doctrine, the Court of Appeals misconstrued it and misapplied it in a manner expressly rejected by this Court, and therefore in conflict with this Court's decisions. The majority below held that, "The Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials" (405 F.2d 738, at 743; App. A, *infra,* p. 8a), citing *Lustig,* supra, and *Byars, supra.* It is submitted that the facts as found by both lower courts do constitute such substantial participation that, as a matter of law, the raids were converted into a joint venture between Federal and Philippine officers. But *Lustig* and *Byars* do not require a "joint venture" or "substantial" participation. This language is merely descriptive of the facts in *Byars* and does not resolve the questions of what is "participation" and what is a "joint operation". *Lustig* clarified the degree of involvement sufficient to require exclusion on the basis of federal participation:

> "But search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made . . . Green's selection of the evidence deemed important for use in a federal prosecution for counterfeiting . . . was not severable, and therefore was part of the search carried on in that room. . . . To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in Byars. . . .
>
> "The crux of that doctrine is that a search is a search by a federal official *if he had a hand in*

> *it;* it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applicability of the Byars case is the actuality of a share by a fededal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." (Id. at 78-79, 69 S.Ct. at 1374. (Emphasis supplied)

The continuing problems of determining participation questions were noted in *Elkins,* 364 U.S. at 211, 80 S.Ct. at 1440-41, as that decision rejected the silver platter doctrine. The present holding of the Ninth Circuit merely shifts the participation inquiry from the state to the international scene. In *Elkins,* Justice Frankfurter, in his dissent, commented on the meaning of participation:

> "(A) vital question has always been whether the offending search or seizure was conducted *in any part by* federal officials *or in the interest* of the Federal Government, or whether it was conducted *solely* by state officers acting *exclusively* for state purposes." (emphasis added.)

364 U.S. at 236, 80 S.Ct. at 1455. Raids and searches, considered as functional operations, must include all steps from the initial planning through the final acquisition of evidence. The instant search therefore involved federal agents' participation and was not *exclusively* for Philippine purposes.

Circuit court cases supporting the proposition that as a matter of law, there was "participation" in this case include ***Knoll Associates, Inc.*** **v.** ***FTC,*** 397 F.2d

530 (7th Cir. 1968); *Serio* v. *United States,* 203 F.2d 576 (5th Cir.), *cert. denied,* 346 U.S. 887 (1953) (participation measured by "assistance, cooperation or collaboration by federal officers"); *United States* v. *Camara,* 271 F.2d 787 (7th Cir. 1959), *vacated and remanded,* 364 U.S. 283 (1960) (evidence admitted because no federal assistance, cooperation and collaboration); *Euziere* v. *United States,* 266 F.2d 88 (10th Cir. 1959), *vacated and remanded,* 364 U.S. 282 (1960) ("The test in all cases is did the federal authorities participate in any way in the search"); *Lowrey* v. *United States,* 128 F.2d 477 (8th Cir. 1942) (federal-state cooperation and tacit understanding); *Fowler* v. *United States,* 62 F.2d 656 (7th Cir. 1932); *Sutherland* v. *United States,* 92 F.2d 305 (4th Cir. 1937).

The trial court and appellate courts made a series of nine (9) intermediate findings of fact on the issue of "participation".* The question of whether these

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* *Findings on Participation by the District Court*

1. "Meetings [between U.S. and Philippine officials] were held to determine the *modus operandi* of the raids." "Some of the[se] meetings were held in the home of U.S. Revenue Agent Robert Chandler" [274 F. Supp. at p. 422, par. 1, Col. 1; App. A, *infra,* p. 33a].

2. "At one of the various meetings of . . . the Philippine National Bureau of Investigation (at which Robert Chandler was also present) the premises to be raided were mentioned." The Army-Navy Club was not included on the list of premises to be raided. *It was placed on the list and searched subsequently, only because of the request or "suggestion" of U.S. Agent Chandler.* [274 F. Supp. at p. 422, Col. 1, 2d par.; App., *infra,* p. 33a]. (Appellants' most important personal and financial records were seized there and were ultimately turned over to the United States).

3. A diagram of premises occupied by two Stonehill companies was drawn by U.S. Agent Robert Chandler [Exh. J in evidence; *ibid.,* p. 422, Col. 1, 3d par.; App. A, *infra,* p. 34a].

4. A memorandum relative to a building occupied by a Stonehill company, the Goodrich Building, was prepared by Robert Chandler

actions constitute "participation" within the purview of *Lustig* and *Byars* and require the exclusion of the evidence thereafter became a question of law.

On this question of law, this Court, in deciding *Lustig,* laid down these rules:

(1) there need not be established "a joint venture between federal and state officers" for evidence to be excluded; (2) the statement in *Byars* to the effect that "*mere* participation in a state search of one who is a federal officer does not render it a federal under-

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prior to the raids (*ibid.*, p. 422, Col. 1, 3d par.; App. A, *infra,* p. 34a).

5. Both Exhibits I and J, the diagram and the memorandum "thereafter came into the possession of the Philippine National Bureau of Investigation." [*Ibid.*, p. 422, Col. 1, 3d par.; App. A, *infra,* p. 34a].

6. Just prior to the raid a copy of one of the [42 identical] search warrants was shown to Robert Chandler, who, upon examining the document, stated that he knew nothing about search warrants but that the contents appeared to be all right [*ibid.*, p. 422, Col. 1, 4th par.; App. A, *infra,* p. 34a].

7. In the course of the various meetings prior to the raids, Chandler was promised that he would be permitted to examine and copy the documents and records which the Philippine National Bureau of Investigation would obtain in connection with appellants' and their companies' activities [*ibid.*, p. 422, Col. 1, last par., cont'd into Col. 2; App. A, *infra,* p. 34a].

8. On March 3, 1962, the day of the raid, Robert Chandler and two agents sent by Washington were stationed near a structure owned by the Philippine National Bureau of Investigation and waited there until that evening when they were requested by the NBI Director to come to his office to look at the documents and records seized by the NBI in the searches of appellants' premises [*ibid.*, p. 422, Col. 2, 2d par.; App. A, *infra,* p. 34a].

9. On the following day arrangements were made for Chandler to copy or photograph the records and documents seized [274 F. Supp., p. 422, Col. 2, 3d par.; App. A, *infra,* p. 35a].

taking" [footnote 10, 273 U.S. at 32; 47 S.Ct. at 249] means only that "participation in a state search by a federal officer does not make an enterprise a federal undertaking *if the federal officer was not acting as such*". [See also: dissenting opinion in *Stonehill*, N. 10, 405 F.2d at 748]; and (3) and most important: evidence must be barred where there is ANY federal participation or interest.

There is no contention in the instant case that the federal officers were not acting in their official capacity. Neither the trial court nor the majority find complete absence of federal participation or interest. Their holding, therefore, constitutes a complete misconception of the silver platter doctrine and attempts to set new, unconstitutional standards for the actions of the Federal Government abroad, different from those applicable within the United States.

As the dissenting Judge pointedly characterized the majority's error: "The majority holds that Federal officers may participate in undertakings violative of Fourth Amendment standards so long as they do not participate *too much*." As there cannot be a little bit of pregnancy, there also cannot be a little bit of participation.

Therefore, the acts of the American agents constitute "participation" as a matter of law and within the meaning of the silver platter doctrine because, as the dissenting Judge said:

> "The Supreme Court expressly rejected [the majority's] approach to the application of the silver platter doctrine in *Lustig*."—405 F.2d, at 751.

b. THERE CAN BE NO RESURRECTION OF THE SILVER PLATTER DOCTRINE. ELKINS REQUIRES EXCLUSION.

The Supreme Court of the Philippines held that the searches and seizures at issue herein were illegal under the Philippine Constitution and that the evidence should be suppressed. The U.S. Federal courts below acknowledged that if the raids had been made in the United States they would have been illegal and a similar result required. Nevertheless, the lower courts held that by the simple means of having the Philippine authorities give the illegal evidence to American authorities, it may form the basis of a valid prosecution in the federal courts. This constitutes the resurrection of the "silver platter" doctrine in relations between independent sovereigns, which doctrine was discarded by this Court in *Elkins* v. *U. S., supra.*

The court below draws a distinction between a State of the Union and a foreign country in determining the suppression issue on the grounds (1) that the Fourth Amendment does not apply to the actions of foreign countries and (2) application of the exclusionary rule would not deter foreign governments from breaching the Fourth Amendment. This rationale misconceives both the issue presented and the broad basis of *Elkins.*

Under the silver platter doctrine, the issue is not whether the Philippine authorities violated the Fourth Amendment of the United States, but whether they violated the similar constitutional provisions of the Philippines. See: *Johnson* v. *U. S.,* 207 F.2d 314, 321 (C.A. 5, 1953). That case dealt with seizures by the Mexican authorities, the court pointing out that due to the then current pre-*Elkins* law, it made no difference whether the Mexicans had violated their local

law in making the seizures, since the silver platter cases made the evidence admissible in any case.

The lower court's second misconception is the breadth of the *Elkins* decision. It reached its erroneous decision by holding that the *Elkins* exclusionary rule was based exclusively on a deterrent rationale and that the deterrent effect was directed primarily against state officers, federal participation no longer being an issue. The court reasoned that foreign officers, unlike state policemen, are not likely or properly to be deterred by a decision of this Court. 405 F.2d at 743. *Elkins,* however, has a much broader basis.* This Court explained the basis of its holding in *Elkins* as follows:

> "The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, *without involvement of federal officers,* be introduced in evidence against a defendant over his timely objection in a federal criminal trial?" [Emphasis supplied].—364 U.S. 206, at pp. 208-209; 80 S.Ct. 1437 at p. 1439.

In answering this question in the negative, this Court relied on its supervisory power over the administration of the Federal Courts and acted to preserve the integrity and dignity of the Federal Courts in line

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* Such a narrow and mistaken interpretation of *Elkins* would lead to inequitable and absurd results similar to those of the pre-*Elkins* silver platter doctrine. Before *Elkins,* a U.S. citizen lost his Fourth Amendment protection in a Federal Court when a Federal officer obtained the evidence on a "silver platter" from a state officer; but kept the protection if the Court found that the Federal officer had a hand in the search.

Under the *Stonehill* rule of the Ninth Circuit, a U.S. citizen, not entitled to rely on *Elkins,* loses his Fourth Amendment protection if a Federal officer obtains evidence on a silver platter from a foreign police officer; but manages to remain protected if he can show that the U.S. agent had a hand in the search.

with its long-standing policy to do so. This policy was expressed in 1927 in *Byars* v. *U. S., supra,* where the Court said that the Fourth Amendment ". . . is not to be impaired by judicial sanction of equivocal methods, which . . . strike at the substance of the constitutional right". [pp. 33, 34].

Mr. Justice Holmes in *Olmstead* v. *United States,* 277 U.S. 438, 485, 470 48 S.Ct. 564, 570, 575 (1928) expressed it most succinctly:

> "For those who agree with me, no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."—Dissenting Opinion.

Secondly, this Court has held that the Fourth Amendment itself prohibits the admission into evidence obtained by unreasonable search and seizure, regardless of who did the searching and seizing.

In *Mapp* v. *Ohio,* 367 U.S. 643 81 S.Ct. 1684 (1961), the Court expressed this dual basis of exclusion:

> "Our decision, founded on reason and truth, *gives to the individual no more than that which the Constitution guarantees him,* to the police officer no less than that to which honest law enforcement is entitled, and *to the courts, that judicial integrity* so necessary in the true administration of justice." [Emphasis supplied].—at p. 1694.

As Mr. Justice Harlan interpreted the majority holding in *Mapp*:

> "Essential to the majority's argument . . . is the proposition that the rule . . . excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives

. . . . from Constitutional requirement." [at p. 1704 Dissenting Opinion].

Thus, the predominant rationale of the exclusionary rule is not the narrow "deterrent" basis, but that (1) judicial integrity is necessary in the true administration of justice; and that (2) the rule derives from Constitutional requirement.

The *Stonehill* case, if upheld, would destroy judicial integrity and fair administration of justice for two million Americans living abroad, and would suspend Constitutional requirements and protection for them, making them second-class citizens.

c. DETERRENT RATIONALE REQUIRES EXCLUSION.

This Court made it clear in *Elkins* that the deterrent rationale, to the limited extent that the exclusionary rule is based on it, is not directed against state officers, but against subterfuge and evasion by federal officers.*

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* Revival of the silver platter doctrine would encourage evasion and subterfuge by federal officers and put an impossible burden of proof on the hapless American citizen abroad—particularly where, as in the case of *Stonehill*, the American official representing him there has elected to destroy him rather than to protect him. [Exh. E].

An additional hardship on our American citizens where a foreign nation is involved is lack of subpoena power over foreign witnesses and documents that would permit full inquiry. Consequently, a defendant is limited to the version of the federal officers who would be encouraged to practice subterfuge and evasion, knowing that the likelihood of contradiction is more remote.

One further effect of not extending *Elkins* to foreign countries would be to create a black market in illegally-obtained evidence. No foreign country needs a pre-arranged agreement with U.S. authorities to know that they can get rid of an American national by illegal raids and by turning over what they find to the I.R.S. If the *Elkins* court was concerned with these tacit agreements with state authorities, the difficulties of burdens of proof makes it even more tempting in the case of foreign authorities.

Non-exclusionary states, until *Mapp,* were free to convict on evidence procured by searches violating Fourth Amendment standards. 364 U.S. at p. 221.

If the deterrent rationale, to the extent that it underlies *Elkins,* is correctly applied to *Stonehill,* the decision of the Ninth Circuit must be reversed. This becomes clear when we take the liberty of substituting the word "foreign" for the word "state" in the following passage from *Elkins,* reported at 364 U.S. 221, 222:

> "Free and open cooperation between [foreign] and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage [foreign] officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by [foreign] agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-[foreign] cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

d. THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT IS VIOLATED BY ADMISSION OF WRITINGS UNCONSTITUTIONALLY SEIZED.

The inter-action of the Fourth and Fifth Amendments has been cited as supporting exclusion in *Boyd* v. *U. S.,* 116 U.S. 616, 6 S.Ct. 524 (1886):

> "[A]ny forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of [Lord Camden's judgment in *Entick* v. *Car-*

rington]. In this regard the Fourth and Fifth Amendments run almost into each other."—id., at 630; 6 S.Ct. at 532.

"And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."—id., at 633; 6 S.Ct. at 534.

Similar language is found in *Agnello* v. *United States,* 269 U.S. 20, 46 S.Ct. 4 (1925). The relationship of the Fourth and Fifth Amendments is noted in *Schmerber* v. *California,* 384 U.S. 757, 761, 767, 86 S.Ct. 1826, 1830, 1834 (1966); *Linkletter* v. *Walker,* 381 U.S. 618, 647, 85 S.Ct. 1731, 1747 (1965) (J. Black, dissenting); *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 703-05, 85 S.Ct. 1246, 1252-53 (1965); *Stanford* v. *Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 511 (1965); *Malloy* v. *Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1494 (1964); *Ker* v. *California,* 374 U.S. 23, 30, 83 S.Ct. 1623, 1628 (1963); *Mapp* v. *Ohio, supra*; *Davis* v. *United States,* 328 U.S. 582, 66 S.Ct. 1256 (1946). *See also* Justice Black's concurring opinion in *Mapp* v. *Ohio, supra.*

Even if the Fourth Amendment is not violated in the foreign search situation, because the search was conducted by foreign officers, as held by the Ninth Circuit, the Fifth Amendment requires exclusion of the illegally seized evidence when offered in the federal trial. *See Schmerber* v. *California, supra*; Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials,* 53 Cornell L. Rev. 886, 893 (1968). *See also* Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va.

L. Rev. 1314, 1346-47 (1967). The use of such evidence is "tantamount to coerced testimony." *Mapp* v. *Ohio, supra.*

The privilege against self-incrimination has been applied to exclude incriminating statements made in a foreign country in interrogation when they were offered in a federal trial. *Bram* v. *U. S.*, 168 U.S. 532, 18 S.Ct. 183 (1897). The coercion practiced in that case was arguably of lesser magnitude than the 200-man raid in the present case.

e. FIFTH AMENDMENT DUE PROCESS, COMITY AND THE ACT OF STATE DOCTRINE REQUIRE EXCLUSION OF EVIDENCE SEIZED UNCONSTITUTIONALLY BY FOREIGN OFFICIALS.

(i) Due process violated by non-exclusion

Admission of evidence illegally seized abroad against an American citizen results in establishment of a class of citizens against whom unconstitutionally seized evidence could not be used even though the same sort of evidence could not be used against a person (resident or alien) of obtained by officers in the United States. *Schneider* v. *Rusk,* 377 U.S. 163, 84 S.Ct. 1187 (1964), prohibits such discrimination between Americans residing in the United States and those living abroad. Admission of this evidence creates a second-class citizenship limiting the rights of United States citizens to live and work abroad. 377 U.S. at 168-69, 84 S.Ct. at 1190.

Constitutional Due Process has been held to include the right to security against arbitrary intrusion by the police. *Wolf* v. *Colorado,* 338 U.S. 25, 27, 69 S.Ct. 1359, 1361 (1949). Due Process also requires exclusion of unconstitutionally seized evidence. *Mapp* v. *Ohio, supra*; *Rochin* v. *California,* 342 U.S. 165, 169-73, 72 S.Ct. 205, 208-10 (1952).

That the Fourth Amendment right of privacy is "implicit in the concept of ordered liberty" and is a "fundamental principle of liberty and justice" (*Palko* v. *Connecticut,* 302 U.S. 319, 324-25, 58 S.Ct. 149, 151-52 (1937), is evident from its enunciation in the Bill of Rights. *Rochin* v. *California, supra. See also Linkletter* v. *Walker, supra*; *Malloy* v. *Hogan, supra.*

The federal-foreign search dichotomy is analogous to the federal-state situation, especially when the foreign search was unconstitutional where conducted.

> "When a federal court is confronted with evidence seized illegally by the police of an exclusionary state, the evidence should be banned, it has been suggested, as a matter of 'comity.' I think there is a more compelling reason: fifth amendment due process forbids the use of such evidence in a federal prosecution."

Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 Minn. L. Rev. 1083, 1162-63 (1959).

There is a more simplistic argument: Evidence illegally or unconstitutionally obtained is by its very nature beyond the bounds of due process of law. By definition, illegally obtained evidence cannot be considered to have been acquired through due process of law. Therefore, it must be excluded.

(ii) Comity and the act of state doctrine require exclusion

In the normal course, the Philippine raids would be presumed lawful by the U.S. courts pursuant to the act-of-state doctrine. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 84 S.Ct. 923; *Underhill* v. *Hernandez,* 168 U.S. 250, 18 S.Ct. 83 (1897); *U. S.* v.

Watkins, 159 F.2d 650 (C.A. 2, 1947). Under these circumstances, the petitioner is remanded to diplomacy or his remedy in the foreign jurisdiction. The Petitioners exercised the latter remedy by bringing a suit for injunction and return of the seized materials in the Philippines. The Supreme Court of the Philippines ruled on June 19, 1967 that the raids in issue here where illegal and suppressed certain evidence. Under the act-of-state doctrine, this decision should be as binding on the U.S. courts as *Banco, Watkins,* and *Hernandez.*

It is Hornbook law that judgments of foreign courts will be recognized by U.S. courts unless the cause of action is "repugnant to our notions of decency." *Ehrenzweig on Conflict of Laws,* p. 202 (1962). See also: *Ingenohl* v. *Walter E. Olsen & Co.,* 273 U.S. 541 47 S.Ct. 451 (1927) (on writ of certiorari to the Supreme Court of the Philippines, reversing a decision of that court that sought to void a decision of the Supreme Court of Hong Kong); *Williams* v. *Armroyd,* 11 (7 Cranch) U.S. 423 (per Marshall, C. J., recognizing and giving effect to the decision of a French prize court seizing an American vessel even though the United States claimed to be neutral and not hostile and the decision of the French court was conceded to be subversive of the law of nations).

In the case at bar, not only is there nothing repugnant about the Philippine decision, but because of the Philippine past legal ties with the United States, their law on the illegal search issue is identical. An analysis of the Philippine decision in this case reveals that its basis is federal decisions, with the holding on suppres-

sion being primarily based on this Court's holding in *Mapp* v. *Ohio, supra.* Because of the Philippine reliance on our decisions, it is proper to look to these same decisions to determine what effect should be given the Philippine judgment.

This Court provided the conclusive answer in *Rea* v. *United States,* 350 U.S. 214, 76 S.Ct. 292 (1956), where federal agents had illegally seized narcotics which were then introduced through the federal agent in a state narcotics prosecution. The Supreme Court ruled that the federal agent should be enjoined from testifying in the state Court and be required to reacquire and destroy the illegally seized narcotics. *Rea* was decided prior to *Elkins* when the silver platter doctrine was still being applied domestically in the lower courts. *Rea* is also in accord with the Court's earlier holding in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 at 40 S.Ct. 182 (1920), that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely such evidence so acquired shall not be used before the Court but that it shall not be used at all."

Clearly the same effect should be given to Philippine determination of an illegal search and seizure as would be given to a domestic one—especially where the courts wholeheartedly agree with the Philippine decision. Thus, the U.S. courts should enjoin and suppress the use in our courts of evidence that has been ruled illegally seized in the Philippines. Any other result would sanction the evasion of the Philippine judgment in a manner identical to the attempted evasion in *Rea.*

f. THE CONSTITUTION FOLLOWS THE FLAG

The Circuit Court's holding is in clear conflict with this Court's holding in *Reid* v. *Covert,* 354 U.S. 1, 77 S.Ct. 1222 (1957), in which the Court said:

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. It can act only in accordance with *all* the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government." [354 U.S. at pp. 5, 6. Emphasis added].

The Court below, in citing *Birdsell* v. *U. S., supra,* and *Brulay, supra* (two cases where analysis of the facts discloses that there was no arguable action by federal agents), attempts to avoid the teachings of *Reid* v. *Covert* and cases following it*, by reasoning that the United States in the instant case was not "acting abroad", the illegal searches and seizures being conducted primarily by foreign police officials. This is incorrect. The United States in the instant case was "acting against its citizens abroad". United States Internal Revenue agents held office in Manila; they collected taxes from Petitioners in Manila; and they obtained the illegally seized evidence in Manila.**

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* *Kinsella* v. *Singleton,* 361 U.S. 235, 80 S.Ct. 297; *Powell* v. *Zuckert,* 366 F. 2d 634 (1966); and *Saylor* v. *U. S.,* 374 F. 2d 894.

** The evidence sought to be suppressed was actually appropriated at Philippine police headquarters pursuant to the pre-search agreement.

The government, indeed, "reached out to punish a citizen who is abroad", and the shield of the Bill of Rights cannot be stripped away. *Reid* v. *Covert, supra.*

Reid v. *Covert* shows that the artificial distinction between *Elkins* and *Stonehill,* permitting revival of the defunct silver platter doctrine, is logically untenable. As this court said in *Elkins*:

> ". . . To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."—364 U.S. at 215 [Footnote omitted].

There is little difference whether a federal officer obtains unconstitutionally seized evidence to be used in a federal court from a state officer within the United States; or whether he obtains it from a foreign officer during an investigation that he conducts outside the United States. The Constitution follows his flag, as well as Petitioners'.

In the instant case, the United States was clearly acting abroad through tax collection, assessment, investigations by agents of the IRS and actual physical acquisition of evidence. As in *Reid* and *Kinsella,* it was necessary for business purposes that the American petitioners live in the Philippines. When faced with a suit in the federal courts they should not be deprived of basic constitutional protections simply because of their place of residence. See also *Schneider* v. *Rusk, supra,* pp. 168-169 (upholding the right of Americans to live abroad without suffering discriminatory treat-

ment by the federal government); *Bram* v. *United States, supra* (suppressing incriminating statements made by accused during foreign interrogation).

g. SUPPRESSION APPLICABLE IN "CIVIL" TAX CASE

Neither the Trial Court nor the Appellate Court based the denial of suppression on the fact that the action below was labeled a civil case. The case at bar, of course, involves a 50% fraud penalty and therefore is quasi-criminal and subject to the exclusionary rule. *One 1958 Plymouth Sedan* v. *Pennsylvania, supra*; *Boyd* v. *U. S., supra*; *Helvering* v. *Mitchell,* 303 U.S. 391, 58 S.Ct. 630 (1938); *Tovar* v. *Jarecki,* 173 F.2d 449 (C.A. 7, 1949); *Berkowitz* v. *United States,* 340 F.2d 168 (1st Cir. 1965); *United States* v. *$5,608.30,* 326 F.2d 359 (7th Cir. 1964); *John Bacall Imports, Ltd.* v. *United States,* 287 F. Supp. 916 (C.D. Cal. 1968).

While there is no precedent "on all fours" in this Court, the exclusionary rule is being applied by many Circuit Courts to "civil actions". Mr. Justice Brennan's opinion in *Wong Sun* v. *U. S.,* 371 U.S. 471 at 486, 83 S.Ct. 407 at 416 (1963) to the effect that the doors of the Federal Courts must be closed to "*any* use of evidence unconstitutionally obtained", was relied on by the Trial Court for this broad application of the rule. *Silverthorne Lumber Co.* v. *U. S., supra; Rogers* v. *U. S.,* 97 F.2d 691 (C.A. 1, 1938); *Berkowitz* v. *U. S. supra; Powell* v. *Zuckert, supra; Saylor* v. *U. S., supra;* 8 Wigmore on Evidnece, 1964 Supp., p. 10; *Goodman* v. *U. S.,* 369 F.2d 166 (C.A. 9, 1966); *Knoll Associates* v. *FTC, supra*; *Pizzarello* v. *U. S.,* —— F.2d —— (C.A. 2, March 19, 1969) civil tax assessment, C.A. 2, Docket # 32532 unofficially reported at 69-1 U.S.T.C., par. 15886, are additional au-

thorities for suppression in civil cases to which the government is a party.

Still other civil cases suppressing evidence include *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968) (anti-trust); *United States* v. *Blank*, 261 F. Supp. 180, 182-84 (N.D. Ohio 1966) (tax); *Hinchcliff* v. *Clarke*, 230 F. Supp. 91, 97, 109 (N.D. Ohio 1963), *reversed on other grounds*, 371 F.2d 697 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *United States* v. *Chase*, 67-1 U.S.T.C. para. 15,733 (D.C.D.C. 1966) (tax). *See also Abel* v. *United States*, 362 U.S. 217, 254, 80 S.Ct. 683, 705 (1960) (J. Brennan, dissenting).

The United States appears to have impliedly conceded the applicability of the exclusionary rule, at least to tax cases involving the 50% penalty. The Internal Revenue Service, through its Associate Chief Counsel, publicly announced that "[it] would be inadvisable to rely upon . . . evidence . . . illegally obtained by the Federal Government, especially by the Internal Revenue Service, particularly in cases where the 50% fraud penalty is involved, because of the *Plymouth Sedan* case." (Vol. 20, # 1, Bulletin of the Section of Taxation, American Bar Ass'n., p. 51).

The argument for exclusion is even stronger in civil cases where the interests of society, as a rule, are less than in criminal prosecutions. To allow such evidence in a civil tax case is to permit officials to make a search and then decide whether to proceed along the civil or criminal route, depending upon the resulting constitutionality of the search and seizure.

The imperative of judicial integrity alone requires that unconstitutionally seized evidence, wherever ob-

tained, be suppressed in any action brought by the federal government, criminal or civil. See *Olmstead* v. *United States, supra* (dissenting opinions of Justices Holmes and Brandeis); *Elkins* v. *United States, supra*; *Mapp* v. *Ohio, supra*; *Linkletter* v. *Walker, supra*; *Hanna* v. *United States,* 260 F.2d 723, 728 (D.C. Cir. 1958); *Hinchcliff* v. *Clarke, supra*; *United States* v. *Chase, supra.*

CONCLUSION

The Court of Appeals Has Erroneously Decided an Important Question of Federal Law Which Should be Settled by This Court

The importance of this question in influencing federal agents in their investigational activities and cooperation agreements with foreign officials requires that this Court determine the issue. The lower courts' decisions admitting this evidence provides the very opportunity for collusion and surreptitious invasion of privacy which was forcefully denied with regard to federal-state cooperation in *Elkins* v. *United States, supra.* The argument for exclusion in foreign search cases is even stronger since the burden of proving collusion is more difficult to overcome in such cases.

> "[T]he court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' . . ."

Byars v. *United States, supra,* 273 U.S. at 32, 47 S.Ct. at 249 (1927).

The importance of the question is amplified upon consideration of the number of Americans living in foreign countries, many of them because of business or job requirements. In 1960 there were 1,374,421 Americans living abroad. This represented three times the 1950 figure. *See U.S. Bureau of the Census, Statistical Abstract of the United States,* Table 10 (1968). That figure has surely grown by 1969 due to military commitments and increased American business activities throughout the world. Activities of the IRS have also expanded overseas. In 1966 foreign posts of the IRS were operating in Paris, London, Ottawa, Mexico City, Rome, Sao Paulo, Manila, Bonn, and Tokyo. *Commissioner of Internal Revenue, 1966 Annual Report* 50. The Commissioner's 1966 *Report* indicates a total internal revenue collection for that year of $474 million through the Office of International Operations. *Id.* at 12. Certainly those Americans living abroad are entitled to no less justice in their dealings with the IRS and in the federal courts than are other citizens.

Resolution of the conflict between the Circuit Court's decision and the decisions of this Court, therefore, is a question of importance in the administration of Federal justice. Unless the decision below is reversed, two million American citizens now living abroad, taxed under the Sixteenth Amendment, will lose the protection of the Fourth and Fifth Amendments of the United States Constitution and the future for many others will be clouded and uncertain.

For the reasons stated above, it is prayed that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

HANS A. NATHAN
BERT B. RAND
1730 K Street, N. W.
Washington, D. C.

JOSEPH A. BALL
120 Linden Avenue
Long Beach, California

Counsel for Petitioners

Of Counsel:

JOHN L. INGOLDSBY, JR.
918 16th St., N. W.
Washington, D. C.

Dated: May 3, 1969

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,346

HARRY S. STONEHILL and ROBERT P. BROOKS, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[December 9, 1968]

On Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS and BROWNING, Circuit Judges, and *BELLONI, District Judge.

BELLONI, District Judge.

This appeal[1] is from an interlocutory order of the United States District Court for the Central District of California which denied appellants' motion to suppress evidence in a civil action brought by the United States of America.

The United States, in January, 1965, filed a complaint seeking foreclosure of Federal tax liens securing Federal income tax liabilities outstanding against Harry S. Stonehill and Robert P. Brooks for 1958 through 1961, inclusive. Taxpayers (appellants Stonehill and Brooks) moved to suppress certain evidence they claimed had been obtained in violation of taxpayer's Constitutional rights.

The trial court held a hearing on the motion, later entering its written order and opinion denying the motion to suppress. *United States* v. *Stonehill*, 274 F.Supp. 420. Subsequently, the trial court granted a certificate under

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* Hon. Robert C. Belloni, United States District Judge, District of Oregon, sitting by designation.

[1] Pursuant to 28 U.S.C. § 1292(b).

28 U.S.C. § 1292(b); taxpayers then petitioned for and were granted permission from this court to appeal from the order.

The question before this court is whether the district court erred in denying taxpayers' motion to suppress. Taxpayers contend that the documents in question should have been suppressed as evidence even if seized by foreign officers in a foreign country, because the searches and seizures were illegal by United States Constitutional standards (in violation of the Fourth Amendment). Taxpayers contend also that the district court erred in concluding that the action of United States agents did not constitute United States "participation" in the illegal searches and seizures. We find no merit to these contentions and affirm the district court's order.[2]

STATEMENT OF FACTS

Taxpayers' motion seeks to suppress numerous documents seized in the Philippines during raids which began March 3, 1962. Better understanding of the issues, however, requires that we examine events which took place over a period of several years. During the tax years in question, taxpayers Stonehill and Brooks were American citizens residing in the Philippines. The tax investigation on which the assessments are based had its inception in the Philippine Islands.

Stonehill and Brooks began business together in the Philippines shortly after World War II and developed a substantial number of businesses, including the United States Tobacco Company. They were officers of, or con-

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[2] Our finding that there was no participation by Federal agents makes it unnecessary to decide other issues raised, i.e., the taxpayers' standing as to suppression of corporate documents, whether the evidence could be used for purposes of impeachment, and whether the exclusionary rule applies to civil cases.

trolled, many successful corporations. As the district court so aptly stated:

> "So eminently successful were they in ascending the ladder of finance that they brought themselves and their activities to the attention of the Philippine authorities and to the attention of the United States Internal Revenue Service." 274 F.Supp. at p. 421.

Robert Chandler was attached to the United States Embassy in Manila as the Internal Revenue Service representative for the Far East. His duties included auditing returns of and collecting taxes from American taxpayers residing in his territory. In 1960, the income tax return of Harry S. Stonehill for the calendar year 1958 was sent to Chandler for audit. Due to lack of personnel, the audit was not conducted. Nothing further was done.

Menhart Spielman had been vice-president of United States Tobacco Company until his discharge by Stonehill and Brooks; before leaving the tobacco company he copied and photographed certain documents and records which he felt disclosed wrongdoing on the part of taxpayers. In December, 1961, Spielman contacted Robert Hawley, a Federal Bureau of Investigation agent attached to the American Embassy in Manila, who in turn directed him to Chandler.

After Chandler met Spielman on December 18, 1961, he concluded that Spielman's information indicated possible tax liabilities due from the taxpayers and that the information might be of interest to the Philippine authorities. On December 22, 1961, Chandler relayed Spielman's information to his office in Washington, D. C., also telling them that any tax investigation was beyond his office's capabilities, and recommending that additional agents be assigned. Chandler spent considerable time with Spielman collecting information, repeatedly asking his headquarters for assistance.

Chandler and Hawley finally persuaded Spielman to meet with the Philippine authorities; on January 27, 1962, Spielman met with Colonel Lukban, who was in charge of the Philippine National Bureau of Investigation. For some time prior to this meeting, the Philippine National Bureau of Investigation (NBI) had been investigating Stonehill and Brooks, gathering evidence which they hoped to use in deporting Stonehill and Brooks from the Philippines as undesirable aliens.

Philippine authorities, as part of their deportation investigation, decided to raid the taxpayers' business premises. Upon learning of the proposed raids, Robert Chandler objected, requesting that such action not be taken or that it at least be postponed. His request was disregarded. Philippine authorities began planning the raids, and because Chandler and Col. Lukban were friends, some of the numerous preparation meetings were held in Chandler's home. Because Spielman was afraid to go to NBI headquarters, meetings between Spielman and the NBI were also held in Chandler's home.

Chandler did not assist in planning the raids, although at one NBI meeting when Chandler was present he did ask if the Army-Navy Club was included on the list of premises to be raided. The information furnished Chandler and the NBI by Spielman was the basis for this question. Chandler suggested including this building; when the raids were conducted it was included.

Under the supervision of Col. Lukban and Jose Diokno (the then-Secretary of Justice for the Republic of the Philippines), the NBI made all the preparations for these raids. In the process of relaying information from Spielman, a diagram prepared by Chandler of one premises and a memorandum prepared by him on another inadvertently fell into the hands of the NBI. They were not intended as directions to the NBI.

The night before the raids Chandler was called to Col. Lukban's home. A large number of NBI personnel were

also present. Chandler was shown a paper described as a warrant and was asked for his comment. He said he knew nothing about search warrants but that the copy appeared to be all right. At this point Chandler made his inquiry about the Army-Navy Club.

After the Philippine authorities decided to conduct the raids, but prior to the raids, Chandler secured permission from Col. Lukban to examine and copy records seized in the raids. However, it is clear that the purpose of the raids was to uncover violations of Philippine law, not to obtain evidence for the United States agents.

The raids on the taxpayers and their corporations commenced Saturday, March 3, 1962, at about 1:00 P.M., at which time the taxpayers were arrested and 200 NBI agents simultaneously raided the business offices of the taxpayers and some 17 different corporations. The NBI took possession of the various corporate premises and began to gather the voluminous documents and records seized in the raids, a process which took from several hours at some locations to several days at others.

When the raids started, Robert Chandler and two agents from his office went to a small temporary structure owned by the NBI across the street from NBI headquarters to wait for the conclusion of the raids, hoping to obtain from the NBI any records which were seized. They remained there all afternoon, and at about 5:00 P.M. read in the evening paper that the taxpayers had been arrested and their various businesses raided, which lead them to believe the raids were completed. About 10:00 P.M. that evening, Col. Lukban asked them to come to his office. There they saw a large volume of records and documents which had been seized in the raids and requested permission to copy or photograph some of them. The request was denied, Col. Lukban indicating that the seized records and documents would not be made available until they had been examined, catalogued, and inventoried by the NBI.

The next day arrangements were made to permit Robert Chandler to photograph or copy some of the documents.

While Chandler and his associates were in Col. Lukban's office, an NBI agent requested the assistance of an accountant to determine which records, from a large number seized in a warehouse of the United States Tobacco Company, were significant; there were too many to bring to NBI headquarters and the NBI agent did not know what to pick up. Col. Lukban asked Chandler to go to the warehouse to help the NBI agent. Chandler agreed. Chandler and two associates went to the warehouse, pointed out the books and records which appeared to be the most significant from an accounting point of view, and left. They made no detailed examination of the records, took no records with them, and did not know what was done with these records after they left.

Chandler drove from the warehouse to the main office of the United States Tobacco Company, several blocks away, and asked the NBI agent in charge if they had found the record storage room Spielman had told both Chandler and the NBI about. The NBI agent did not seem to know about it and asked Chandler to point it out. Chandler stepped into the office, pointed out generally the location of the record storage area, and left. He was only on the premises about five minutes and did not enter the room or examine any records.

On March 5, 1962, some, but not all, of the seized records were made available to United States agents for the first time. After an examination of these records, the Internal Revenue Service opened a fraud investigation of the taxpayers, ultimately resulting in the jeopardy assessments which are the basis of this suit.

OPINION

After a lengthy hearing on the motion to suppress these documents, the district judge entered his written opinion (274 F. Supp. 420), which found as facts most of the fore-

going. We are bound by his findings unless they are clearly erroneous. We believe, as a result of our review of the ten-volume transcript and exhibits, that the foregoing narrative is a fair statement of the events. It includes some facts not found by the district judge, but contains nothing in conflict with them. Indeed, we find no conflict between the district judge's findings and the record, although appellants take emphatic objection to some of the findings and believe other events[3] are material and constitute evidence of sufficient involvement to prove that the United States agents instigated the raids. We do not agree.

The raids were found to have been illegal searches and seizures by the Philippine Supreme Court as violating a section of the Philippine Constitution which is identical to our Fourth Amendment. The search warrants were defective because no *specific* offense had been alleged. 274 F.Supp. at p. 424. If the raids had been conducted by United States agents, they would have been illegal under our Constitution.

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[3] For example, Secretary Diokno flew to Hong Kong on February 11, 1962 and saw an aide of Attorney General Kennedy, a Mr. Seigenthaler. At this meeting, Secretary Diokno requested help of the United States in investigating the taxpayers; specifically, he requested that the services of some tobacco experts be made available to him in investigating the activity of the taxpayers' Philippine tobacco companies. No help was requested of Secretary Diokno by the United States at this meeting, or by Mr. Chandler at any meeting. Further, Secretary Diokno has admitted that the help he requested of the United States was never provided. Around the time of the Hong Kong trip, Secretary Diokno decided to have the taxpayers arrested and their companies' business premises raided in connection with the NBI's investigation.

Appellants also rely on a copy of a memorandum sent January 10, 1962 from the Revenue Service representative in Manila to the office of International Operations in Washington, D. C., as indicating U. S. participation in the March raids. (Defendants' Ex. E.) This document only reaffirms the U. S. position prior to the raids of being interested but not yet ready to take any action.

We do not think that either the visit to Mr. Kennedy's assistant nor the impeaching document aids appellants' position.

Neither the Fourth Amendment of the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers from violating the Fourth Amendment, is applicable to the acts of foreign officials. *Brulay* v. *United States,* 383 F.2d 345 (9th Cir. 1967). The reasoning for this is:

1) all relevant evidence is admissible unless there is an exclusionary rule;

2) even the Fourth Amendment does not by itself provide for exclusion of evidence unlawfully obtained;

3) the Supreme Court, in *Weeks* v. *United States,* 232 U.S. 383 (1914), in order to force United States officers to abide by the Fourth Amendment, created the exclusionary rule;

4) there is nothing our courts can do that will require foreign officers to abide by our Constitution.

Thus, the Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials. *Byars* v. *United States,* 273 U.S. 28 (1927); *Lustig* v. *United States,* 338 U.S. 74 (1949); *Symons* v. *United States,* 178 F.2d 615 (9th Cir. 1949); *Sloane* v. *United States,* 47 F.2d 889 (10th Cir. 1931).

Prior to the decisions of the Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643 (1961) and *Elkins* v. *United States,* 364 U.S. 206 (1960), wherein the Supreme Court held that the Fourth Amendment was incorporated in the Fourteenth Amendment and therefore applicable to State agencies, it was pertinent to inquire whether Federal officials so substantially participated in a raid by State officials so as to convert the raid into a joint venture between State and Federal officials and therefore subject to the provisions of the Fourth Amendment. The essentials of that inquiry are equally pertinent in determining whether Federal officials so substantially participated in a raid by foreign

officials as to convert that raid into a joint venture between the United States and the foreign government and therefore subject to the provisions and sanctions of the Fourth Amendment.

In all reported Federal cases holding a search to be a Federal search, the participation by Federal officers has been far more extensive than here. The Supreme Court, in *Byars* v. *United States, supra,* held that a State search and seizure was the act of the United States and violated the Fourth Amendment because of the substantial participation in the search and seizure by a Federal agent. State officers, on their way to execute a search warrant, asked a Federal prohibition agent (Adams) to accompany them. Upon arriving at the premises to be searched, each of the officers, including Adams, was assigned a room to search and the search was conducted under the authority of the State warrant. Adams searched the kitchen and found some stamps (counterfeit strip stamps of the type used on whiskey bottled in bond), and a State officer also found stamps in another room. Adams kept the stamps he found, and, because they did not represent a violation of any State laws, the State officer turned over the other stamps to Adams. The court found that Adams participated as a Federal enforcement officer on the chance that something would be disclosed of official interest to him as such agent. This substantial participation by Adams was found to be under color of his Federal office and the search, in substance and effect, a joint operation of the local and Federal officers. The court (273 U.S. at p. 33) stated:

> "The effect is the same as though he had engaged in the undertaking as one exclusively his own."

Emphasizing the fact that mere participation by a Federal officer would not render a search a Federal undertaking, the court, at p. 32, stated:

> "... the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent

> violations of the Constitution by circuitous and indirect methods.'

The court also noted, at p. 33:

> "Similar questions have been presented in a variety of forms . . . each of them rest, as the present case does, upon its own peculiar facts. . . ."

The acts of participation must be such that the search and seizure can be said to be a joint operation or joint venture between the United States and the State or foreign government. Whether the search does become a joint venture can be determined only by a comparison of what the Federal agent did in the search and seizure with the totality of acts done in the search and seizure. In *Byars,* the court concluded that the only reason a Federal agent was present at the time of the raid was to select that evidence which was subsequently introduced in the Federal prosecution. Further, the Federal agent selected certain evidence according to the sole criterion of its use in a Federal prosecution, and he kept exclusive possession of this evidence at all times.

Subsequently, the Supreme Court reaffirmed the *Byars* doctrine in *Lustig* v. *United States, supra.* In *Lustig,* Secret Service Agent Greene had reason to suspect two defendants of violations of the counterfeiting statutes, but, upon looking through the keyhole of the suspects' room, could see no evidence of any violation and reported this fact to the local police. Greene also told the local police that he was "confident that something was going on." The local police secured arrest warrants alleging violations of State law and went to the hotel room to make the arrests. The defendants were not in the room; the police searched the room and discovered evidence which indicated counterfeiting of currency. The local police then called Greene, who had remained at police headquarters because he was "curious to see what they would find." Greene went to

the hotel room and examined the items discovered by the local police. Upon returning, the defendants were arrested and searched, with Greene inspecting the items found in their pockets. Some of the articles seized were given to Greene before he left the room, and all were eventually turned over to him. On these facts the Supreme Court found participation on the part of the Federal agent, stating:

> "So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." 338 U.S. at p. 79.

The court was of the opinion that Greene's activities were not severable and were therefore part of the search carried on in the room. The court in *Lustig* held that to differentiate in participation from the beginning and joining a search before it had run its course would be to draw too fine a line in the application of the *Byars* doctrine. Greene went to the hotel room hoping to find evidence which could be used in a Federal prosecution, he and the State officers concerned themselves especially with turning up evidence of violations of the Federal counterfeiting laws, and the articles seized were either taken by or were turned over to the Federal agent during the search. Greene clearly participated in his capacity as a Federal agent and was searching for possible Federal violations.

Corngold v. *United States,* 367 F.2d 1 (9th Cir. 1966), is another case where the action of a Federal agent was held to be Federal participation. In *Corngold,* a package was delivered to an airline in Los Angeles for shipment to New York. A Federal customs agent suspected the package contained contraband and so informed an airline employee. The customs agent instigated and participated in the opening and inspecting of the package without a search warrant. A divided court held this to be an illegal search and seizure (because of the failure to obtain a search warrant), finding that the customs agent and the airline employee

had been engaged in a joint operation and the Federal participation would prevent the evidence from being admissible in Federal court. This court, relying on the *Byars* doctrine, stated:

> "When a Federal agent participates in such a joint endeavor, the effect is the same as if he had engaged in an undertaking exclusively his own." 367 F.2d at p. 6.

In *Corngold,* the airline employee would not have conducted a search but for the insistence of the Federal agent, and even then he did so reluctantly.

The above cases, by applying the exclusionary rule, found participation by Federal agents. The *Byars* doctrine clearly requires that the participation question be determined by a thorough examination of the facts of each case.

Brulay v. *United States,* 383 F.2d 345 (9th Cir. 1967), is a recent opinion of this court which was discussed and relied upon by the trial court here. Mexican authorities arrested Brulay and seized evidence. The Tijuana municipal policemen had stopped Brulay because the car he was driving looked heavy in the rear, and arrested him because he appeared to be nervous. After arresting him, they discovered 300 pounds of amphetamine tablets in the trunk. Although United States Customs had previously alerted Mexican Federal Police to the defendant's activities, the court found no United States participation in the arrest or seizure, and, further, that the actions of the Mexican officers had not been instigated by United States Customs or Narcotics officials. The court held that the seized tablets were properly admitted.

In *Birdsell* v. *United States,* 346 F.2d 775 (5th Cir. 1965), *cert. denied,* 382 U.S. 963, Birdsell objected to evidence allegedly obtained in violation of the Fourth Amendment. The arrest and seizure were made in Mexico by

Mexican officials, without participation by United States agents. A Texas deputy sheriff who happened to be passing through town did assist the Mexican authorities by acting as an interpreter. The court held the evidence to have been properly admitted, stating:

> "... the Fourth Amendment does not apply to arrests and searches made by Mexican officials in Mexico for violation of Mexican law, even if the persons arrested are Americans and American police officers gave information leading to the arrest and search." 346 F.2d at p. 782.

In a footnote in the *Birdsell* opinion, the court indicated that if Federal officials induced foreign police to engage in conduct which shocked the conscience, then a Federal court *might,* in the exercise of its supervisory powers, refuse to allow the prosecution to enjoy the fruits of such action. The court noted that *Birdsell* was not such a case; neither is the instant case.

In *Sloane* v. *United States, supra,* a Federal prohibition agent gave information obtained from an informant (concerning the location of a still) to a deputy sheriff. State officers obtained a search warrant, searched the premises, and seized evidence incriminating Sloane. The evidence was later turned over to the Federal agent for prosecution in Federal court. Sloane's motion to suppress the evidence was denied. The court stated that a Federal agent must not be permitted to do indirectly that which he cannot do directly, and thus circumvent the provisions of the Fourth Amendment against unreasonable search and seizure. However, in *Sloane* the court held that the Federal agent neither ordered nor directed the search, that there was no Federal participation, and the motion to suppress was properly denied.

Other cases dealing with the "participation" question deserve brief mention. In *Shurman* v. *United States,* 219

F. 2d 282 (5th Cir. 1955), a Federal narcotics officer informed a State officer he believed Shurman's car contained narcotics. He did not request any action on the part of the State officer, merely gave the information. The State officer arrested Shurman, found narcotics in the car, and ultimately the case was turned over to Federal authorities for prosecution. The court, although finding that the search was illegal for lack of a warrant, admitted the evidence because no participation by Federal officers, or such cooperation between Federal and State authorities as to prevent the use of the evidence, was shown. Clearly, the giving of information, without more, does not amount to participation or make a later search a joint venture.

In *Symons* v. *United States, supra,* Federal agents who arrived several hours after an initial search and seizure by State officers and took charge of the evidence (narcotics), were held not to have participated in the arrest or in the search and seizure. The casual presence of a Federal officer at the scene of a search is not sufficient to make the Federal officer a participant under the *Byars* doctrine.

United States v. *Brown,* 151 F.Supp. 441 (E.D. Va. 1957). In *Brown,* a Federal officer inadvertently arrived at the scene of a State search, having come to the address on another matter. Also see *Myers* v. *United States,* 49 F. 2d 230 (4th Cir. 1931), and *United States* v. *Evans,* 179 F.Supp. 834 (D.Md. 1960).

The facts of the case at hand require it to be placed in the category of cases holding that Federal officers did not undertake or unlawfully participate in an unconstitutional search and seizure. The principal factors leading to that conclusion are:

1) No United States agent selected any evidence for use in a United States investigation or prosecution—nor for that matter did any Philippine officer on their behalf. On

the contrary, the raids were instigated and planned by Philippine officers before United States agents became involved; the sole purpose of the raids was to obtain evidence for Philippine proceedings.

2) All activities of United States agents in connection with the raids took place before the raids commenced or after their termination.

3) Only after the raids were completed and the documents catalogued were the United States agents given permission to copy documents, if any, which might be of interest to them.

4) There is no evidence that any United States agents were attempting to shortcircuit the Fourth Amendment rights of the taxpayers, as proscribed in the language of the *Byars* case ("by circuitous and indirect methods.")

5) The United States agents clearly objected to the raids, asking that the raids either not take place or at least that they be postponed.

6) When the United States agents made Spielman's information available to the Philippine authorities, they were not requesting any action whatsoever, much less instigating an unlawful search. It should also be noted that the search was illegal due to defective search warrants; which, properly prepared, might have satisfied Constitutional requirements.

Since United States officials did not participate in the unlawful search, but rather obtained the contested evidence in a lawful manner, the denial of the motion to suppress was proper and the interlocutory order of the District Court is affirmed.

BROWNING, Circuit Judge, dissenting:

Contrary to the impression left by the majority, the evidence which it holds admissible was obtained by searches and seizures which flagrantly violated basic provisions of the Philippine Constitution borrowed directly from the Fourth Amendment.[1] The warrants were not issued "upon probable cause."[2] Moreover, they were general warrants, containing no language "particularly describing the . . . things to be seized."[3] In suppressing the evidence the Supreme Court of the Philippines said,

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[1] Phil. Const. Art. III, § 1(3).

[2] The applications for the warrants stated that the articles to be seized "are being used or intended to be used in the commission of a felony, to wit: Violation of the Central Bank Laws, Tariff and Customs Laws, Internal Revenue Code and the Revised Penal Code" (a description covering about 1,000 offenses), and that the place to be searched "has been observed to be the meeting place or accommodation office where various individuals meet in connection with illegal transactions for the purpose of defrauding the government." A few added that "the same has also been observed as the place where illegally imported cigarette papers are being cut and kept with the Chambon Slitter Machine."

As the Supreme Court of the Philippines held, "it was *impossible* for the judges who issued the warrants to have found the existence of probable cause," for there was no showing that the parties against whom the warrants were sought had "performed *particular* acts, or committed *specific* omissions, violating a given provision of our criminal laws. As a matter of fact, the applications involved in this case do not allege any specific acts . . ." Stonehill v. Diokno, 20 Phil. Sup. Ct. Rpts. Ann. 383, 391-92 (1967).

[3] The warrants authorized the seizure at each of the 32 premises raided of all "documents and/or papers showing all business transactions."

The Philippine Supreme Court condemned this sweeping authorization as "openly contravening the explicit command of our Bill of Rights—that the things to be seized be *particularly* described—as well as tending to defeat its major objective: the elimination of *general* warrants." 20 Phil. Sup. Ct. Rpts. Ann. at 393.

"To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed in our Constitution. . . ." *Stonehill* v. *Diokno,* 20 Phil. Sup. Ct. Rpts. Ann. 383, 392 (1967).[4] It is clear that the raids would be equally lawless under the Fourth Amendment.[5]

The majority concludes that the evidence is nonetheless admissible in federal court because it was seized by foreign officials, to whom the Fourth Amendment does not apply,[6] and was turned over to United States agents "on a silver platter." *Lustig* v. *United States,* 338 U.S. 74, 79 (1949).

Under the "silver platter" doctrine, evidence seized by state officers in violation of Fourth Amendment standards was, until the decision of *Elkins* v. *United States,* 364 U.S. 206 (1960),[7] admissible in a federal trial court unless the purpose of the search was to obtain evidence of a federal offense (*Gambino* v. *United States,* 275 U.S. 310 (1927)); or unless federal officers participated in the search. *Lustig* v. *United States,* 338 U.S. 74 (1949); *Byars* v. *United States,* 273 U.S. 28 (1927).

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[4] The sweeping and indiscriminate manner in which the warrants were executed sustains the court's judgment. Two hundred agents of the Philippine National Bureau of Investigation occupied 32 separate premises, rummaged through private and business files for more than 12 hours, and trucked away thousands of documents.

[5] *See, e.g.,* Stanford v. Texas, 379 U.S. 476 (1965); Marron v. United States, 275 U.S. 192, 195-96 (1927); Boyd v. United States, 116 U.S. 616, 624-30 (1886); Saylor v. United States, 374 F. 2d 894, 898 (Ct. Cl. 1967); Powell v. Zuckert, 366 F. 2d 634, 640 (D.C. Cir. 1966).

[6] Brulay v. United States, 383 F. 2d 345, 348 (9th Cir. 1967); Birdsell v. United States, 346 F. 2d 775, 782 (5th Cir. 1965).

[7] In *Elkins,* the Court, relying on its supervisory power over the administration of criminal justice in federal courts, held that any evidence illegally seized by state officers is inadmissible in a federal prosecution.

Assuming that the "silver platter" doctrine governs this case,[8] it is misapplied by the majority.

As will be noted in greater detail later, the district court made no finding as to the *purpose* of the raids; the applicability of the *Gambino* rule to this case therefore cannot be determined on the present record.

In dealing with the issue of American *participation* in the raids, the majority has resurrected a misconception regarding this aspect of the "silver platter" doctrine which the Supreme Court laid to rest in *Lustig* v. *United States, supra.*

The majority repeatedly asserts the view that the evidence here is admissible unless the federal agents so substantially participated in the raids as to convert them into "joint ventures" between the United States and Philippine officials. In short, the majority holds that federal officers may participate in undertakings violative of Fourth Amendment standards so long as they do not participate too much.

This view is apparently derived from a misreading of *Byars* v. *United States,* 273 U.S. 28 (1927). There, the Court held that the Fourth Amendment applied where "the search in substance and effect was a joint operation of the local and federal officers." 273 U.S. at 33. But

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[8] It may be argued that *Elkins* requires suppression of evidence in a federal court whenever the evidence was seized in a search which would have violated the Fourth Amendment if conducted by federal officials. In Brulay v. United States, 383 F. 2d 345 (9th Cir. 1967), though, we rejected this result when dealing with a search conducted by foreign officials. It has been said that *Brulay* considered only the deterrence rationale of the exclusionary rule and that the result there was inconsistent with other bases for the rule. *See* Ninth Circuit Review, 10 Ariz. L. Rev. 235, 273-74 (1968); 53 Cornell L. Rev. 886, 892-96 (1968); 46 Texas L. Rev. 791, 793-95 (1968). It may also be that *Brulay* should not be applied where, as here, the search violated local law as well as Fourth Amendment standards.

the quoted language is simply a description of the facts in *Byars,* not a formulation of the general standard to be applied in determining the applicability of the Fourth Amendment in all cases.[9] If this was not clear in *Byars* itself, the Supreme Court made it so in *Lustig.*

The sole issue in *Lustig* was the interpretation and application of *Byars,* which the Third Circuit had read as the majority of this court reads it.[10] Reversing, Mr. Justice Frankfurter said:

> "The crux of [the *Byars*] . . . doctrine is that a search is a search by a federal official *if he had a hand in it.* . . . The decisive factor in determining the applicability of the *Byars* case is the actuality of

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[9] The same is true of the similar language in Corngold v. United States, 367 F. 2d 1, 6 (9th Cir. 1966). We went on to adopt the rule in Lustig v. United States, quoted hereinafter.

[10] Like the majority, the Third Circuit relied on the statement in *Byars* that "*mere* participation in a state search of one who is a federal officer does not render it a federal undertaking." 273 U.S. at 32. *See* 159 F. 2d 798, 800 (3d Cir. 1947). In context, this statement means only that participation in a state search by a federal officer does not make the enterprise a federal undertaking *if the federal officer was not acting as such.* The next paragraph of the *Byars* opinion begins:

> "The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as *a private person* might have been, but was asked to participate and did participate *as a federal enforcement officer,* upon the chance, which was subsequently realized, that something would be disclosed of *official interest to him as such agent.*" 273 U.S. at 32 (emphasis added).

The Court went on to say:

> "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise *when the federal government itself, acting through its agents as such,* participates in the wrongful search and seizure." 273 U.S. at 33 (emphasis added).

> *a share by a federal officer* in the total enterprise of securing and selecting evidence by other than sanctioned means. . . . *So long as he was in it* before the object of the search was completely accomplished, *he must be deemed to have participated in it.*" 338 U.S. at 78-79 (emphasis added).

Justice Frankfurter later explained that under the doctrine, "the question has always been whether the offending search or seizure was conducted *in any part* by federal officers or in the interest of the Federal Government; or whether it was conducted *solely* by state officers acting exclusively for state purposes." 364 U.S. at 236 (emphasis added).[11]

The inquiry must focus on what the federal officers did, since only they are subject to the Fourth Amendment.[12] If the raids were conducted in part by federal officials, acting as such, the evidence seized must be excluded. This is the legal standard, and not whether the search or seizure was a "joint operation"—a conception to which there is no reference in *Lustig*.[13]

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[11] Justice Frankfurter was dissenting from the Court's rejection of the "silver platter" doctrine. The *Elkins* majority did not quarrel with Justice Frankfurter's statement of the true limits of that doctrine.

See also Euziere v. United States, 266 F. 2d 88, 90 (10th Cir. 1959): "The test in all cases is did the federal authorities participate *in any way* in the search?" (emphasis added).

[12] This is the premise of the *Brulay* and *Birdsell* decisions, note 6, *supra*, upon which the majority relies.

[13] Little is to be gained from the kind of case-by-case factual comparisons the majority has undertaken since each case must be determined on its own facts. Byars v. United States, 273 U.S. 28, 33 (1927). Moreover, it is evident from the majority's recitations that in those lower court cases in which no participation was found, there was less federal involvement than is present here, even assuming that those decisions faithfully reflected the Supreme Court holdings in *Byars* and *Lustig*. It has been pointed out that nig-

Accepting the findings of the district court, as supplemented by the majority of this court,[14] the American agents contributed to the unlawful enterprise in at least these respects: They brought Spielman and his information[15] to the attention of the Philippine authorities, and, as the majority finds, "finally persuaded" Spielman to meet with them. Chandler made his home available to the NBI for meetings with Spielman, and for the "planning" and "preparation" of the raids. Chandler attended these meetings.[16] In the course of "relaying information" from

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gardly and reluctant administration of the *Byars-Lustig* rule by some lower courts imposed impossible evidentiary burdens (even more formidable in a foreign search) upon the victims of searches and seizures, and tempted federal and state officials to collusion and deceit. Kamisar, *Wolf* and *Lustig* Ten Years Later, 43 Minn. L. Rev. 1083, 1165-96 (1959). The inevitable consequence was the holding in *Elkins* that evidence unconstitutionally seized by state officers must be excluded from federal prosecutions without regard to whether federal officers participated in any way.

[14] As will be noted later, the district court made no findings with respect to some of these occurrences, and made materially different findings than the majority of this court does with respect to others. The majority's version, however, reflects the minimum participation by American agents which could be justified by the evidence, and is therefore accepted for the purposes of the argument here.

[15] The value of Spielman's information was reflected in Chandler's statement that without it the Philippine authorities had nothing.

[16] Chandler testified that 10 or 12 meetings were held, and that he attended "most" of them. Chandler described his role in these meetings as that of a "mediator" between Spielman and the NBI agents, and testified that he tried "to express [to the NBI] what Spielman was trying to tell them." During this period Chandler, who had been assigned an NBI liaison, also met with officials of the NBI in their offices and his own, sometimes once or twice a day. Chandler testified that all of these meetings concerned the investigation of appellants' affairs; and that among the matters discussed was "the location of documents and records in the premises which were going to be raided."

Spielman to the NBI, Chandler prepared a diagram and a memorandum of two of the premises to be raided.[17] Chandler suggested an additional location to be raided; and his suggestion was adopted.[18] Chandler, prior to the raids, "secured permission from Colonel Lukban to examine and copy records seized in the raids." After the raids had begun, Chandler and his two assistants, at Colonel Lukban's request, went to one of the premises being searched, and "pointed out" the "significant" books and records to be seized.[19] From this search location the three American agents, on their own initiative, went to

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[17] On their face, these documents disclose detailed information as to places to be searched and things to be seized. Chandler identified much of the writing as his own. Chandler testified that these documents were "probably" prepared and given to Spielman to assist the latter in transmitting the information they contained to the NBI and that he presumed that this information "would probably be used in the raids." The testimony of other witnesses indicates that the course the raiders took conformed to the suggestions in these exhibits.

[18] Chandler testified that he examined some of the documents seized at this location and found them to be "the type of thing we would be interested in."

[19] The majority's pallid and somewhat misleading description of this occurrence should be compared with Chandler's own testimony, on which it is based.

Chandler testified that Colonel Lukban told him that an NBI agent "had run into a big area of records and he didn't know what —he was not qualified to determine what he should take and what he shouldn't take, and he asked me if I would help him—if myself and the men would go down there and look at the records and see what should be taken and what should be left behind."

Chandler and the two IRS agents "wanted to cooperate with" Lukban and therefore went with an NBI agent to the premises where the records had been found. Upon arriving, the three agents did not merely point out the apparently significant books and records at the warehouse and leave, as the majority suggests. Chandler testified that for about half an hour he and his two agents "went through the records and segregated what we thought might be important, and . . . put them in a box." After placing

another. There Chandler inquired whether the NBI agents had found a records storage room which Spielman had mentioned, and upon discovering that they had not, Chandler pointed out the location of the storage room to the NBI agent in charge.[20]

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the records in a box, the American agents "indicated to the [NBI] agent that that is all we could see was of any significance."

Having done this, the agents did not simply leave, as the majority's statement implies. The majority omits to mention that Chandler, acting on information Spielman had supplied, then examined bobbins of cigarette paper in the warehouse which he thought might be significant in the investigation. Chandler, who was accompanied by the NBI agent in charge, testified:

> "I mentioned to him that that was the—seemed to be the paper that was overshipped, there were supposed to be more on each reel than it was marked for. The agent didn't seem to be familiar with the thing at all. I told him that he probably better check with Colonel Lukban."

[20] Again, in the majority opinion, some of the flavor of the incident has been lost in the telling.

Chandler testified that after leaving the first search location, he and his two agents went to the main office of the United States Tobacco Corp. to see whether NBI activity there was "equally disorganized." Chandler entered this building, and the NBI agent in charge there was brought to him. Chandler testified:

> "I asked him how things were going and just general questions and after a while I asked them if they had found—there was a records storage room in this building that Spielman had spoken of, and I asked him if he had found that—there was something peculiar about the location of the room, I don't recall now what it was; anyhow the agent didn't seem to be familiar with it, and I tried to tell him about it as best I could remember from what Spielman had said, but he didn't seem to understand. He finally said, 'Come up and show me.'"

Chandler testified that he then showed the NBI agent where the record storage room was located.

The majority omits to mention that NBI agents subsequently entered the room identified by Chandler and removed the records, and that a witness testified that Chandler accompanied the NBI agents into the room, although Chandler denied it.

The majority's conclusion that these acts do not constitute "participation" by American agents in the search within the meaning of the "silver platter" doctrine does not rest entirely upon its adoption of the erroneous "joint operation" standard of participation. A second misconception of law also appears to contribute significantly to the result. The majority asserts that "[a]ll activities of United States agents in connection with the raids took place before the raids commenced or after their termination"—and this the majority identifies as one of the "principal factors" leading to its conclusion of lack of "participation." Since it is established by the majority's own version of the facts that the American agents were involved in events preceding and following the *initial physical intrusion upon the raided premises*, it is evident that the majority uses the word "raids" in this highly restricted sense.

The Supreme Court expressly rejected this approach to the application of the silver platter doctrine in *Lustig*. As Justice Frankfurter said, "search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense." He concluded that, "It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." 338 U.S. at 78, 79.

Thus, in determining whether the American agents participated in the searches and seizures, the enterprise must be viewed as a functional whole. The contributions which the American agents made, before the raids, in selecting places to be searched and things to be seized, cannot be treated as unrelated to the total enterprise. Neither can the conduct of our agents, after the raids had begun, in examining records, selecting and segregating significant material for seizure, and consulting with and advising

NBI agents in the conduct of the searches; these acts were clearly an integral part of the "effective appropriation" of the illicitly seized evidence.[21]

In light of this conduct of the American agents, it is of no consequence that they may have "objected to the raids." Officials of our government are obliged to adhere to the Constitution; it is not enough that they violate its limitations reluctantly.

This is the point of central importance. Because our government "is entirely a creature of the Constitution,"[22] it is bound to respect the limitations which the Constitution imposes upon its powers, whether it acts at home or abroad.[23] Because the United States, acting through its agents,[24] participated in searches and seizures which were in flagrant violation of the Fourth Amendment, the evidence acquired should be suppressed.[25]

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[21] Moreover, the uncontradicted testimony established that it was not until several hours after these events that the NBI loaded the fruits of the raids into trucks and left the two premises involved.

[22] Reid v. Covert, 354 U.S. 1, 5-6 (1957).

[23] *Id.; see* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Saylor v. United States, 374 F. 2d 894, 898-901 (Ct. Cl. 1967); Powell v. Zuckert, 366 F. 2d 634, 639-40 (D.C. Cir. 1966). *See also* Best v. United States, 184 F. 2d 131, 138 (1st Cir. 1950).

[24] It is clear that the American agents acted throughout in their official capacities; there is no claim to the contrary.

[25] The caveats in note 2 of the majority opinion are without substance. The issue of standing was expressly reserved by the district court and is not before us. With all due respect, appellee's "impeachment" argument, which calls for an indiscriminate extension of the limited rule of Walder v. United States, 347 U.S. 62 (1954), is frivolous. There is little more substance to the suggestion that the exclusionary rule is inapplicable because this is a civil case. Rogers v. United States, 97 F. 2d 691 (1st Cir. 1938), relying upon Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), is directly in point. Illegally seized evidence may not be used in a quasi-criminal context, such as a forfeiture proceeding. *E.g.*,

Even if this were not so, reversal would be required on a second, independent ground—the inadequacy of the trial court's findings. The majority has undertaken to fill the gaps by de novo fact-finding of its own; this an appellate court may not do. The only proper course is to remand the case to the trial court for further consideration and the entry of adequate findings.[26]

One example has been mentioned earlier—the district court made no finding as to whether or not one purpose of the raids was to obtain evidence for use in an American tax prosecution. Indeed, the trial court's findings appear deliberately to avoid the issue.[27] The majority opinion, on

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One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1885). Although the Supreme Court distinguished tax proceedings such as this from quasi-criminal proceedings for some purposes in Helvering v. Mitchell, 303 U.S. 391 (1938), more recent decisions illuminating the purpose and scope of the exclusionary rule indicate that the Court would extend the rule to "civil" suits of the kind instituted by the United States here. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 530-31 (1967); See v. City of Seattle, 387 U.S. 541 (1967); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[26] *Cf.* Kelley v. Everglades Drainage Dist., 319 U.S. 415 (1943); Irish v. United States, 225 F. 2d 3, 8 (9th Cir. 1955); 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1138 (Wright ed. 1961).

[27] The most nearly relevant findings of the district court read:

> "For some time before Colonel Lukban's interview with Mr. Spielman, the Philippine National Bureau of Investigation had been engaged in gathering evidence concerning the activities of Stonehill and Brooks, which evidence was for use in deportation proceedings against them . . . .
>
> During the deportation investigation, Colonel Lukban determined that a raid should be made upon premises occupied by Stonehill and Brooks . . . ." 274 F.Supp. at 421.

These findings contain no direct statement as to the purpose of the raids. They clearly do not exclude the possibility that one object of the raids was to obtain evidence for United States use.

the other hand, flatly asserts that "the purpose of the raids was to uncover violations of Philippine law, *not* to obtain evidence for the United States agents."; and again, that "[t]he *sole purpose* of the raids was to obtain evidence for Philippine proceedings" (emphasis added).

The majority makes this finding in the face of substantial evidence to the contrary. Indeed, a Philippine official who participated in the raids testified directly that the Philippine authorities "were actually cooperating with [the Americans] for their tax case. Our interest was mainly on the involvement of politicians in possible wrongdoings in that country." He testified that he was told by Chandler just before the raids "that we needed to get all the vouchers, accounting forms, books of account, that may help them in this tax case." He further testified that his Philippine superior indicated, in advance of the raids, that "whatever we could get by forms or accounting forms and vouchers that might help the United States should be shown to them." There was, in addition, an abundance of circumstantial evidence that one of the purposes of the raids was to obtain evidence for an American tax prosecution.[28]

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[28] The following is a summary of a portion of this evidence. American interest in a possible tax case against Stonehill antedated Spielman's appearance by many years. Both before and after receiving Spielman's information the local American tax agents were aware of the need for an investigation of Stonehill's tax affairs but lacked the personnel to conduct it. Assistance was requested of Washington, but was not forthcoming. Chandler and FBI Agent Hawley took Spielman to the Philippine authorities. Chandler told the Philippine authorities that he thought there was an American tax case against Stonehill, but that the evidence had to be secured. Colonel Lukban told Chandler that if Spielman's story checked out he would seek approval of an investigation by Philippine authorities. Chandler testified that in the course of meetings with Philippine authorities prior to the raids he made it clear that his interest was in appellant's tax records as distinguished from those relating to bribery or political matters. When

It is, of course, the exclusive function of the trial court to resolve the conflict between this evidence and that upon which the majority presumably bases its finding. Since the issue may well be determinative,[29] remand is required.

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first told that the raids were contemplated, Chandler asked that they be postponed until he could obtain help from Washington. Later the raids were postponed for a week. A Philippine official testified that the reason for this postponement was that the people who were to come from the United States to help Chandler had not arrived. One of the American tax agents expected by Chandler arrived in this interval. Chandler and an FBI agent assisted in arranging a meeting in Hong Kong between the Philippine Secretary of Justice and the Executive Assistant to the Attorney General of the United States. The contemplated raids were discussed at this meeting. Upon his return to Manila, the Secretary of Justice ordered the raids to proceed. The warrants issued by the Philippine magistrates referred to possible violation of internal revenue laws, but the Philippine Bureau of Revenue had no contact with the case before the raids. In the course of the raids Chandler and his associates were requested to, and did, select and segregate significant accounting records from the mass of documents found at one of the raided premises. At Chandler's request, Colonel Lukban agreed in advance to make the seized documents available to the American agents, and in fact did so. The agents examined and copied documents over a period of about three months, initially in office space provided by the Philippine authorities.

[29] Gambino v. United States, 275 U.S. 310 (1927) involved a search conducted solely to aid enforcement of a federal statute, but later decisions extended *Gambino's* exclusionary rule to evidence seized by state officers in contemplation of possible federal use even though the state officers also contemplated use of the seized evidence in a state prosecution. Lowrey v. United States, 128 F. 2d 477, 478-79 (8th Cir. 1942); Sutherland v. United States, 92 F. 2d 305, 307-08 (4th Cir. 1937); Fowler v. United States, 62 F. 2d 656, 657 (7th Cir. 1932). *But see* Kitt v. United States, 132 F. 2d 920, 922 (4th Cir. 1942).

Justice Frankfurter said in *Elkins*, "The question has always been whether the offending search or seizure was conducted *in any part* . . . in the interest of the Federal Government; or whether it was conducted . . . *exclusively* for state purposes." 364 U.S. at 236 (dissenting opinion) (emphasis added).

There are many other instances of de novo fact-finding scattered through the majority's account of the activities of the American agents. A few examples will suffice.

The majority finds that "Chandler did not assist in planning the raids"; the trial court found only that the raids were not "instigated" by Chandler or other United States officials. The majority's finding ignores the evidence of Chandler's participation in the numerous planning meetings which preceded the raids,[30] his selection of one of the locations to be raided,[31] and his preparation of the diagram and memorandum identifying places to be searched and types of documents to be seized.[32]

The majority finds that this diagram and memorandum "inadvertently fell into the hands of the NBI," and "were not intended as directions to the NBI"; the district court found only that these documents "thereafter came into the possession of" the NBI. The evidence may support the trial court's carefully limited findings; it does not support the finding of the majority.[33]

The district court made no findings at all with respect to the two visits by the American agents to raided premises in the course of the search. The majority's version of these incidents is based entirely upon the testimony of Chandler and one of his assistants. It does not fully reflect even that testimony which, with other evidence, is inconsistent with the majority's finding denigrating the significance of these events.[34] This intervention by the majority in the fact-finding process may be of particular significance since the trial court apparently shared the

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[30] See note 16.

[31] See text at note 18.

[32] See note 17.

[33] See note 17.

[34] See notes 19 and 20.

majority's misapprehension that these events were irrelevant, and, freed of that error, might well have found from the evidence that this conduct by the American agents exceeded permissible limits.

At the very least, therefore, reconsideration by the trial court is plainly required.

[Filed April 7, 1969]

Order Staying Issuance of Judgment

Upon application of BERTRAM H. ROSS counsel for the Appellants, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 41(a)* of the certified copy of the judgment of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May 4, 1969. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

RICHARD W. CHAMBERS
United States Circuit Judge

DATE: April 4, 1969
San Francisco, Calif.

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* Of the Federal Rules of Appellate Procedure.

[Filed October 16, 1967]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 65-127-HW

UNITED STATES OF AMERICA, *Plaintiff*,

v.

HARRY S. STONEHILL, ROBERT P. BROOKS; TIERRA RANCH, INC., CONTRACTS DISCOUNT, INC.; JOHN E. FORT, JULIUS BAER & CO.; TITLE INSURANCE AND TRUST COMPANY, SAM STEINBERG; MURRAY M. OTSTOTT, HERMINIZ OTSTOTT; and JOE STEINBERG, *Defendants*.

Order Denying Motion to Suppress

Defendants Harry S. Stonehill and Robert P. Brooks, in quest of fame and fortune after the war, went to the Philippines. So eminently successful were they in ascending the ladder of finance that they brought themselves and their activities to the attention of the Philippine authorities and to the attention of the United States Internal Revenue Service.

In 1960 the tax return of defendant Stonehill for the year 1958 was sent for audit to Mr. Robert Chandler, the United States Internal Revenue Service representative in the Philippines. Because of lack of personnel in his office, Mr. Chandler notified Washington that it was not possible to audit the return and requested assignment of agents to conduct the audit.

Harry S. Stonehill and Robert P. Brooks owned, were officers of, or controlled many companies and corporations. Among the corporations they owned or controlled was United States Tobacco Corporation which allegedly had obtained monopoly of tobacco sales in the Philippine Islands. Menhart Speilman was a trusted employee of the

United States Tobacco Corporation but was discharged from his employment by Stonehill and Brooks. His discharge was effected in such manner that Speilman left his employment with a spirit of vengeance and, prior to his departure, had copied and photographed certain documents and records of the United States Tobacco Corporation which he felt disclosed wrongdoing on the part of defendants' corporation.

Mr. Speilman went to Agent Robert Hawley of the United States Federal Bureau of Investigation who was assigned to the American Embassy in Manila; Speilman displayed the copies of records and documents he had obtained from the files of United States Tobacco Corporation and related to Agent Hawley alleged unlawful activities of the corporation and of Stonehill and Brooks.

In evaluating the copies of documents and records together with Mr. Speilman's story so presented to him, Agent Hawley concluded that if the United States Government had any interest in defendants' activities, such interest would arise out of violation of United States tax laws; consequently, Agent Hawley took Mr. Speilman to Robert Chandler of the Internal Revenue Service.

Mr. Chandler looked at the documents and records so presented to him, heard Mr. Speilman's story, and came to the conclusion that the information might be of interest to the Philippine authorities; hence, Mr. Speilman was referred to the Philippine National Bureau of Investigation, and an appointment was arranged for him to be interviewed by Colonel Lukban who was in charge of the Philippine National Bureau of Investigation.

For some time before Colonel Lukban's interview with Mr. Speilman, the Philippine National Bureau of Investigation had been engaged in gathering evidence concerning the activities of Stonehill and Brooks, which evidence was for use in deportation proceedings against them to remove them

from the Philippine Islands as undesirable aliens. [Stonehill and Brooks were later deported.]

During the deportation investigation, Colonel Lukban determined that a raid should be made upon premises occupied by Stonehill and Brooks and the various corporations which they owned, controlled, or of which they were officers.[1] Colonel Lukban mentioned the contemplated raid to Robert Chandler, and Robert Chandler negated any procedure which included raiding. Nevertheless, the Philippine National Bureau of Investigation consummated raid plans, and meetings were held to determine the modus operandi of conducting the raid. As Colonel Lukban and Robert Chandler were friends, some of the meetings were held in the home of Robert Chandler.

At one of the various meetings of members of the Philippine National Bureau of Investigation (at which Robert Chandler was also present) the premises to be raided were mentioned, and Robert Chandler inquired whether the Army and Navy Building was included on the list of premises; and when informed that the Army and Navy Building was not on the list, he suggested that the building be included. When the raid was conducted the Army and Navy Building was among the premises searched.

Sometime during the investigation of defendants Stonehill and Brooks by the Philippine National Bureau of In-

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[1] Corporations so owned, controlled by, or of which Stonehill and/or Brooks were officers are as follows: U.S. Tobacco Corporation, Atlas Cement Corporation, Atlas Development Corporation, Far East Publishing Corporation (Evening News), Investment Inc., Industrial Business Management Corporation, General Agricultural Corporation, American Asiatic Oil Corporation, Investment Management Corporation, Holiday Hills, Inc., Republic Glass Corporation, Industrial and Business Management Corporation, United Housing Corporation, The Philippine Tobacco-Flue-Curing and Redrying Corporation, Republic Real Estate Corporation, and Merconsel Corporation.

vestigation a diagram of the premises occupied by the Evening News and the United States Tobacco Corporation was drawn by Robert Chandler [Exhibit J in evidence], together with a memorandum relative to the Goodrich Building [Exhibit I]. The diagram and the memorandum thereafter came into possession of the Philippine National Bureau of Investigation.

To conduct the raid of defendants' premises the Philippine National Bureau of Investigation obtained search warrants, and just prior to the raid a copy of one of the search warrants was shown to Robert Chandler who, upon examining the document, stated that he knew nothing about search warrants but that the copy appeared to be all right.

In the course of the various meetings, Colonel Lukban had promised Robert Chandler that he, Chandler, would be permitted to examine and copy documents and records which the Philippine National Bureau of Investigation obtained in connection with defendants' activities and the activities of their various corporations.

On March 3, 1962—the day of the raid—Robert Chandler and two agents (sent by Washington to audit the Stonehill return for 1958), at approximately one o'clock in the afternoon, were stationed at or near a small, temporary structure owned by the Philippine National Bureau of Investigation. Mr. Chandler and the two agents waited there until about ten o'clock of that evening, at which time Colonel Lukban contacted them and requested that they come to his office. Chandler and the two agents went to Colonel Lukban's office, saw the documents and records seized by the Philippine National Bureau of Investigation in its raid upon defendants' premises and, when Chandler requested permission to copy or photograph some of the records and documents, his request to copy or photograph them was denied.

Permission to copy or photograph was denied on the ground that no copying or photographing could be done

by anyone until after the Philippine National Bureau of Investigation completed an inventory of the items seized by it. On the following day arrangements were made to permit Robert Chandler to copy or photograph the records and documents seized.

Shortly after seizure of the records and documents belonging to the defendants as individuals, or owned by corporations controlled or owned by them, an action was filed in the Manila court by Harry S. Stonehill, Robert P. Brooks, John J. Brooks and Karl Beck, in which action they demanded return of all documents seized by the Philippine National Bureau of Investigation on the ground that the items seized were obtained under unlawful search warrants.

The Philippine Constitution, Article III, Section 3 (Bill of Rights) states:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 126, Section 3, of the Rules of Court of the Supreme Court of the Philippines, provides as follows:

> "Sec. 3. Requisites for issuing search warrant.—A search warrant shall not issue but upon probable cause in connection with one specific offense to be determined by the judge or justice of the peace after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the person or things to be seized.
>
> "No search warrant shall issue for more than one specific offense."

The search warrants used by the Philippine National Bureau of Investigation were the same form (42 warrants) except for description of the premises to be searched and the signatures of the complaining witnesses. The warrants described the offenses of defendants as

> "Violation of Central Bank Laws, Tariff and Custom Laws, Internal Revenue Code and Revised Penal Code."

The search warrant affidavits stated, in part:

> "This application is founded on confidential information received by the undersigned as peace officer and information which I have personally investigated and found to be as follows:
>
> "The said office has been observed to be the meeting place or accommodation office where various individuals meet in connection with illegal transactions for the purpose of defrauding the government."

The raid hereinbefore discussed was conducted by the Philippine National Bureau of Investigation on March 3, 1962. Thirty-four months later—on January 5, 1965—the United States Government filed with this court the above-entitled action. The complaint alleges that a delegate of the Commissioner of Internal Revenue assessed income tax deficiencies against defendant Harry S. Stonehill for the calendar years 1958 through 1961 in the sum of $13,613,721.51 and against Robert P. Brooks, defendant herein, in the total sum of $11,182,966.73. The complaint also alleges that assessment notices and demand for payment have been sent to each of the defendants but that they have refused to pay the sums due and owing to the United States Government.

Plaintiff, in its complaint, requests this court to adjudge and decree that the aforementioned tax liabilities

are secured by liens on the property of the respective defendants, and that the court make an order that the government is entitled to enforce the tax liens outstanding against the defendants.

Defendants in the action filed a Motion to Suppress the records and documents obtained through the Philippine National Bureau of Investigation in the raid of March 3, 1962. The Motion to Suppress was severed from the other issues of the cause and set for hearing. At the hearing the parties presented evidence as to the legality of the search warrants under which the evidence sought to be suppressed had been seized and evidence as to alleged participation therein by United States agents.

In the course of the hearing of the Motion to Suppress, and while evidence was being adduced, the Supreme Court of the Philippines rendered its decision in the action theretofore filed by Stonehill and Brooks in Manila—Harry S. Stonehill, et al - vs - Honorable Jose W. Diokno, etc., et al, C. R. No. L—19550. The Philippine Supreme Court held the search warrants which were the subject of the action to be illegal and void. The Court said:

> "Two points must be stressed in connection with this constitutional mandate, namely: (1) that no warrant shall issue but upon probable cause, to be determined by the judge in the manner set forth in said provision; and (2) that the warrant shall *particularly* describe the things to be seized.
>
> "None of these requirements has been complied with in the contested warrants. Indeed, the same were issued upon applications stating that the natural and juridical persons therein named had committed a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code.' In other words, no *specific* offense had been alleged in said applications. The averments thereof with respect to

the offense committed were *abstract.* As a consequence, it was impossible for the judges who issued the warrants to have found the existence of probable cause, for the same presupposes the introduction of competent proof that the party against whom it is sought has performed *particular* acts, or committed *specific* omissions, violating a given provision of our criminal laws. As a matter of fact, the applications involved in this case do not allege any specific acts performed by herein petitioners. It would be a legal heresy of the highest order, to convict anybody of a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code,'—as alleged in the aforementioned applications—without reference to any determinate provision of said laws or codes.

"'To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed in our Constitution, for it would place the sanctity of the domicile and the privacy of communication and correspondence at the mercy of the whims, caprice or passion of peace officers. * * *."

This Court agrees with the Philippine Court's determination that the search warrants were unlawful and void; hence, the searches and seizures under the warrants were illegal.

In the within Motion to Suppress defendants contend that the raid conducted by the Philippine National Bureau of Investigation was "instigated" by Robert Chandler and other representatives of the United States Government. This contention of instigation is rejected by this Court, as the evidence is clearly to the contrary. The Philippine officials had defendants under investigation for consummation of contemplated deportation proceedings. In addition, Robert Chandler plainly expressed his disapproval of raid procedures to obtain evidence for any purpose.

Defendants further assert that the records and documents in question should be suppressed as evidence because Robert Chandler and other officials of the United States Government "participated" in the raid. The record is unequivocal that neither Robert Chandler nor any other United States Government official or employee participated in, was present at, or a party to the raid conducted by the Philippine National Bureau of Investigation. The evidence discloses that the extent of any "participation" by Robert Chandler was knowledge that a raid was in contemplation of the Philippine authorities. Although he had such knowledge, there is no evidence that Robert Chandler or any United States official or employee took any part in the raid or actually participated therein.

It is plaintiff's assertion that although the search by the Philippine officers has (by the Supreme Court of the Philippines) been determined to be illegal, nevertheless, the United States Government may in this action use the documents and records obtained in that search, unless an agent of the United States Government so substantially participated in the seizure thereof as to convert the search into a joint venture between United States and Philippine authorities. In support of its contention the plaintiff cites *Byars* v. *United States* (1927), 273 U.S. 28 and *Lustig* v. *United States* (1949), 338 U.S. 74.

Neither counsel, in briefing the motion now under consideration, has mentioned that since 1960 the rule of the "participation" cases seems to be that *no* document or evidence seized in an unlawful search by state officers may be used in a federal court.

In *Elkins* v. *United States,* 364 U.S. 206, the Supreme Court said, at page 223:

> "* * * we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity

from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. * * *."

The rule of Elkins, supra, has been approved by the Supreme Court in at least two cases since 1960. In *Preston* v. *United States* (1964), 376 U.S. 364, the Court said, at page 366:

> "The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers. * * *."

And again, in *Wong Sun* v. *United States* (1963), 371 U.S. 471, the Supreme Court spoke on the subject as hereinafter discussed.

While the search in Elkins, supra, was made by state officers, the search in the case above-entitled was made by officers of the Philippine government. But there would seem to be little distinction between illegal searches by state officers and illegal searches by foreign officials when, as a result of such search, a United States District Court is required to rule upon the admissibility of the evidence seized.

The United States Court of Appeals for the Ninth Circuit does, however, make a distinction, for in *Brulay* v. *United States of America* (decided August 9, 1967), No. 21,198, that Court says:

> "The Fourth Amendment is directed at the Federal Government and its agencies. Fourth Amendment rights are protected from state encroachments by the Fourteenth Amendment which reaches the states and their agencies. * * *. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying

an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico."

In Brulay, supra, two Mexican police officers arrested defendant without a warrant and without probable cause, according to United States of America standards. Although the Mexican officers had been alerted as to the defendant by United States Border Patrol agents, the latter did not participate in any manner in defendant's arrest nor in the ensuing search and seizure.

Brulay was convicted of conspiring to smuggle drugs into the United States (18 U.S.C. §§ 371, 545) and appealed his conviction, contending that the fruits of the illegal search by the Mexican officers had been admitted as evidence to convict him in the federal court. Upon the ground hereinabove quoted, the United States Court of Appeals for the Ninth Circuit upheld the admission of the evidence.

Ordinarily the question of search and seizure arises in criminal prosecutions, but this Court sees no reason for not also applying the rule in civil actions. It would seem that in motions like that now before the Court the only question should, in reality, be: Was the search illegal? If it was, then the fruit of such search should not be used in a federal court, pursuant to language contained in *Wong Sun* v. *United States*, 371 U.S. 471, in which Mr. Justice Brennan, speaking for the Supreme Court, said at page 486:

> "* * *. Nor do the policies underlying the exclusionary rule invite any logical distinction [between physical and verbal evidence illegally obtained] * * * [e]ither in terms of deterring lawless conduct by federal officers, * * * or of **closing the doors of the federal courts to any use of evidence unconstitutionally obtained,* * * *."

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* Emphasis supplied.

Under standards of this United States and/or of the Philippines, the records and documents which are the subject of the Motion to Suppress herein were obtained through unlawful search and seizure because of defective search warrants. But, from the rationale of Brulay, supra, the Ninth Circuit Court of Appeals seems to be of the opinion, for the reason therein so ably expressed, that the rule of Elkins, supra, is inapplicable if the illegal search and seizure is made by foreign government officers.

It may be that the United States Supreme Court will extend the Elkins rule to include any and all evidence illegally obtained, whether seized at home or abroad, when that evidence is presented in a United States Court; but until such extension of the rule is made, this Court is bound by Brulay, supra.

As the Court has hereinabove found there was not instigation nor participation by United States Government officers or employees to exclude the evidence presented; and as the rule of Brulay, supra, permits admission of evidence obtained by foreign officers which, if it had in the same manner been obtained by United States officers, would be excluded as the fruit of unlawful search,

It Is Ordered that the Motion to Suppress is denied.
Dated: October 16, 1967.

Harry C. Westover
Judge

[Filed October 23, 1967]

WM. MATTHEW BYRNE, JR.
United States Attorney

LOYAL E. KEIR
Assistant United States Attorney
Chief, Tax Division
808 U. S. Courthouse
Los Angeles, Calif. 90012
Telephone: 688-2410
Attorneys for United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 65-127-HW Civil

UNITED STATES OF AMERICA, *Plaintiff*

v.

HARRY S. STONEHILL, ET AL., *Defendant*

Certificate of District Judge Pursuant to Title 28 U.S.C.A. 1292(b)

The defendants having requested certification pursuant to Title 28 U.S.C.A. 1292(b), the undersigned United States District Judge does hereby certify that on October 16, 1967 he entered an order denying defendants Stonehill and Brooks motion to suppress evidence in the above-entitled cause after a full trial and hearing thereon. He further certifies that said motion to suppress was covered from the other issues of the cause and was separately tried before the undersigned judge and that the order entered by the undersigned judge involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the

litigation. The District Court retains jurisdiction over all other issues and the further taking of depositions and other discovery proceedings for use in the untried issues in this cause are not stayed hereby.

DATED: This 23 day of October, 1967.

HARRY C. WESTOVER
United States District Judge

I hereby attest and certify on October 23, 1967, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A. CHILDRESS
Clerk, U. S. District Court
Central District of California

By MABEL MCELWEE, *Deputy*
Mabel McElwee

APPENDIX B

REPUBLIC OF THE PHILIPPINES
SUPREME COURT, MANILA

G. R. No. L-19550

Present:

CONCEPCION, C. J.	REGALA	ZALDIVAR
REYES	MAHALINTAL	SANCHEZ and
DIZON	BENZGON	CASTRO

HARRY S. SONEHILL, ROBERT P. BROOKS, JOHN J. BROOKS and KARL BECK, *Petitioners,*

v.

HON. JOSE W. DIOKNO, in his capacity as SECRETARY OF JUSTICE; JOSE LUKBAN in his capacity as Acting Director, National Bureau of Investigation; SPECIAL PROSECUTORS PEDRO D. CENZON, EFREN I. PLANA and MANUEL VILLAREAL, JR. and ASST. FISCAL MANASES G. REYES; JUDGE AMADO ROAN, Municipal Court of Manila; JUDGE ROMAN CANSINO, Municipal Court of Manila; JUDGE HERMOGENES CALUAG, Court of First Instance of Rizal Quezon City Branch, and JUDGE DAMIAN JIMENEZ, Municipal Court of Quezon City, *Respondents.*

Decision

CONCEPCION, *C.J.*

Upon application of the officers of the government named on the margin [1]—hereinafter referred to as Respondent-

[1] Hon. Jose W. Diokno, in his capacity as Secretary of Justice, Jose Lukban, in his capacity as Acting Director National Bureau of Investigation, Special Prosecutors Pedro D. Cenzon, Efren I. Plana and Manual Villareal, Jr., and Assistant Fiscal Manases G. Reyes, City of Manila.

Prosecutors—several judges[2]—hereinafter referred to as Respondent-Judges—issued, on different dates,[3] a total of 42 search warrants against petitioners herein[4] and/or the corporations of which they were officers,[5] directed to any peace officer, to search the persons above-named and/or the premises of their offices, warehouses and/or residences, and to seize and take possession of the following personal property to wit:

> "Books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, typewriters, and other documents and/or papers showing all business transactions including disbursements receipts, balance sheets and profit and loss statements and Bobbins (cigarette wrappers)."

as "the subject of the offense; stolen or embezzled and proceeds or fruits of the offense," or "used or intended to be used as the means of committing the offense," which is described in the applications adverted to above as "vio-

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[2] Hon. Amado Roan, Judge of the Municipal (now City) Court of Manila, Hon. Roman Cansino, Judge of the Municipal (now City) Court of Manila, Hon. Hermogenes Caluag, Judge of the Court of First Instance of Rizal, Quezon City Branch, Hon. Eulogio Mencias, Judge of the Court of First Instance of Rizal, Pasig Branch, and Hon. Damian Jimenez, Judge of the Municipal (now City) Court of Quezon City.

[3] Covering the period from March 3 to March 9, 1962.

[4] Harry S. Stonehill, Robert P. Brooks, John J. Brooks and Karl Beck.

[5] U. S. Tobacco Corporation, Atlas Cement Corporation, Atlas Development Corporation, Far East Publishing Corporation (Evening News), Investment Inc., Industrial Business Management Corporation, General Agricultural Corporation, American Asiatic Oil Corporation, Investment Management Corporation, Holiday Hills, Inc., Republic Glass Corporation, Industrial and Business Management Corporation, United Housing Corporation, The Philippine Tobacco-Flue-Curing and Redrying Corporation, Republic Real Estate Corporation and Merconsel Corporation.

lation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and the Revised Penal Code."

Alleging that the aforementioned search warrants are null and void, as contravening the Constitution and the Rules of Court—because, inter alia: (1) they do not describe with particularity the documents, books and things to be seized, (2) cash money, not mentioned in the warrants, were actually seized; (3) the warrants were issued to fish evidence against the aforementioned petitioners in deportation cases filed against them; (4) the searches and seizures were made in an illegal manner; and (5) the documents, papers and cash money seized were not delivered to the courts that issued the warrants, to be disposed of in accordance with law—on March 20, 1962, said petitioners filed with the Supreme Court this original action for certiorari, prohibition, mandamus and injunction, and prayed that, pending final disposition of the present case, a writ of preliminary injunction be issued restraining Respondent-Prosecutors, their agents and/or representatives from using the effects seized as aforementioned, or any copies thereof, in the deportation cases already adverted to, and that, in due course, thereafter, decision be rendered quashing the contested search warrants and declaring the same null and void, and commanding the respondents, their agents or representatives to return to petitioners herein, in accordance with Section 3, Rule 67, of the Rules of Court, the documents, papers, things and cash moneys seized or confiscated under the search warrants in question.

In their answer, respondents-prosecutors alleged[6] (1) that the contested search warrants are valid and have been issued in accordance with law; (2) that the defects of said warrants, if any, were cured by petitioners' consent; and (3) that, in any event, the effects seized are admissible in evidence against herein petitioners, regardless of the alleged illegality of the aforementioned searches and seizures.

On March 22, 1962, this Court issued the writ of preliminary injunction prayed for in the petition. However,

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[6] *Inter alia.*

by resolution dated June 29, 1962, the writ was partially lifted or dissolved, insofar as the papers, documents and things seized from the offices of the corporations above-mentioned are concerned; but, the injunction was maintained as regards the papers, documents and things found and seized in the residences of petitioners herein.[7]

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[7] "Without prejudice to explaining the reasons for this order in the decision to be rendered in the case, the writ of preliminary injunction issued by us in this case against the use of the papers, documents and things from the following premises: (1) The office of the US Tobacco Corp. at the Ladasma Bldg., Arzobispo St., Manila; (2) 932 Gonzales, Ermita, Manila; (3) office at Atlanta St. bounded by Chicago, 15th & 14th Sts., Port Area, Mla; (4) 527 Rosario St., Mla.; (5) Atlas Cement Corp. and/or Atlas Development Corp., Magsaysay Bldg., San Luis, Ermita, Mla.; (6) 205 13th St., Port Area, Mla.; (7) No. 224 San Vicente St., Mla.; (8) Warehouse No. 2 at Chicago & 23rd Sts., Mla.; (9) Warehouse at 23rd St., between Muella de San Francisco & Boston, Port Area, Mla.; (10) Investment Inc., 24th St. & Boston; (11) IBMC, Magsaysay Bldg., San Luis, Mla.; (12) General Agricultural Corp., Magsaysay Bldg., San Luis, Manila; (13) American Asiatic Oil Corp., Magsaysay Bldg., San Luis, Manila; (14) Room 91, Carmen Apts., Dewey Blvd., Manila; (15) Warehouse Railroad St. between 17 & 12 Sts., Port Area, Manila; (16) Rm 304, Army & Navy Club, Manila South Blvd.; (17) Warehouse Annex Bldg., 18th St., Port Area, Manila; (18) Rm. 81 Carmen Apts., Dewey Blvd., Manila; (19) Holiday Hills, Inc., Trinity Bldg., San Luis, Manila; (20) No. 2008 Dewey Blvd.; (21) Premises of 24th St. & Boston, Port Area, Manila; (22) Republic Glass Corp., Trinity Bldg., San Luis, Manila; (23) IBMC, 2nd Flr., Trinity Bldg., San Luis, Manila; (24) IBMC, 2nd Flr., Gochangco Bldg., 610 San Luis, Manila; (25) United Housing Corp., Trinity Bldg., San Luis Manila; (26) Republic Real Estate Corp., Trinity Bldg., San Luis, Manila; (27) 1437 Colorado St., Malate, Manila; (28) Phil. Tobacco Flue-Curing, Magsaysay Bldg., San Luis, Manila and (29) 14 Baldwin St., Sta. Cruz, Manila, in the hearing of Deportation Cases Nos. R-953 and 955 against petitioners, before the Deportation Board, is hereby lifted. The preliminary injunction shall continue as to the papers, documents and things found in the other premises namely: in those of the residences of petitioners, as follows: (1) 13 Narra Road, Forbes Park, Makati, Rizal; (2) 15 Narra Road, Forbes Park, Makati, Rizal; and (3) 8 Urdaneta Avenue, Urdaneta Village, Makati, Rizal."

Thus, the documents, papers, and things seized under the alleged authority of the warrants in question may be split into two (2) major groups, namely: (a) those found and seized in the offices of the aforementioned corporations, and (b) those found and seized in the residences of petitioners herein.

As regards the first group, we hold that petitioners herein have *no* cause of action to assail the legality of the contested warrants and of the seizures made in pursuance thereof, for the simple reason that said corporations have their respective personalities, separate and distinct from the personality of herein petitioners, regardless of the amount of shares of stock or of the interest of each of them in said corporations, and whatever the offices they hold therein may be.[8] Indeed, it is well settled that the legality of a seizure can be contested *only* by the party whose rights have been impaired thereby,[9] and that the objection to an unlawful search and seizure is *purely personal* and cannot be availed of by third parties.[10] Consequently, petitioners herein may not validly object to the use in evidence against them of the documents, papers and things seized from the offices and premises of the corporations adverted to above, since the right to object to the admission of said papers in evidence belongs *exclusively* to the corporations, to whom the seized effects belong, and may not be invoked by the corporate officers in proceedings against them in their individual capacity.[11] Indeed, it has been held:

> "* * * that the Government's action in gaining possession of papers belonging to the *corporation* did

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[8] Newingham, et al. v. United States, 4 F. 2d 490.

[9] Lesis v. U.S., 6 F. 2d 22.

[10] In re Dooley (1931), 48 F. 2d 121; Rouda v. U.S., 10 F. 2d 916; Lusco v. U.S., 287 F. 69; Ganci v. U.S., 287 F. 60; Moris v. U.S., 26 F. 2d 444.

[11] U.S. v. Gass, 17 F. 2d 997; People v. Rubio, 57 Phil., 384, 394.

not relate to nor did it affect the *personal* defendants. If these papers were unlawfully seized and thereby the constitutional rights of or any one were invaded, they were the rights of the *corporation* and *not* the rights of the *other defendants.* Next, it is clear that a question of the lawfulness of a seizure can be raised *only* by one *whose rights have been invaded.* Certainly, such a seizure, if unlawful, could *not* affect the constitutional rights of defendants *whose property had not been seized or the privacy of whose homes had not been disturbed;* nor could they claim for themselves the benefits of the Fourth Amendment, when its violation, if any, was with reference to the rights of *another.* Remus v. United States (C.C.A.) 291 F. 501, 511. It follows, therefore, that the question of the admissibility of the evidence based on an alleged unlawful search and seizure does *not* extend to the personal defendants but embraces *only the corporation* whose property was taken. * * *." (A. Guckenheimer & Bros. Co. v. United States, [1925] 3 F. 2d, 786, 789, italics supplied.)

With respect to the documents, papers and things seized in the residences of petitioners herein, the aforementioned resolution of June 29, 1962, lifted the writ of preliminary injunction previously issued by this Court,[12] thereby, in effect, restraining herein Respondent-Prosecutors from using them in evidence against petitioners herein.

In connection with said documents, papers and things, two (2) important questions need be settled, namely: (1) whether the search warrants in question, and the searches and seizures made under the authority thereof, are valid or not; and (2) if the answer to the preceding question is in the negative, whether said documents, papers and things may be used in evidence against petitioners herein.

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[12] On March 22, 1962.

Petitioners maintain that the aforementioned search warrants are in the nature of general warrants and that, accordingly, the seizures effected upon the authority thereof are null and void. In this connection, the Constitution[13] provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

Two points must be stressed in connection with this constitutional mandate, namely: (1) that no warrant shall issue but *upon probable cause,* to be determined by the judge in the manner set forth in said provision; and (2) that the warrant shall *particularly* describe the things to be seized.

None of these requirements has been complied with in the contested warrants. Indeed, the same were issued upon applications stating that the natural and juridical persons therein named had committed a "violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code." In other words, no *specific* offense had been alleged in said applications. The averments thereof with respect to the offense committed were *abstract.* As a consequence, it was *impossible* for the judges who issued the warrants to have found the existence of probable cause, for the same presupposes the introduction of competent proof that the party against whom it is sought has performed *particular* acts, or committed *specific* omissions, violating a given provision of our criminal laws. As a matter of fact, the applications involved

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[13] Section 1, paragraph 3, of Article III thereof.

in this case do not allege any specific acts performed by herein petitioners. It would be a legal heresy, of the highest order, to convict anybody of a "violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code,"—as alleged in the aforementioned applications—without reference to any determinate provision of said laws or codes.

To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed in our Constitution, for it would place the sanctity of the domicile and the privacy of communication and correspondence at the mercy of the whims, caprice or passion of peace officers. This is precisely the evil sought to be remedied by the constitutional provision above quoted—to outlaw the so-called general warrants. It is not difficult to imagine what would happen, in times of keen political strife, when the party in power feels that the minority is likely to wrest it, even though by legal means.

Such is the seriousness of the irregularities committed in connection with the disputed search warrants, that this Court deemed it fit to amend Section 3 of Rule 122 of the former Rules of Court[14] by providing in its counterpart, under the Revised Rules of Court[15] that "a search warrant shall not issue but upon probable cause *in connection with*

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[14] Reading: * * * A search warrant shall not issue but upon probable cause to be determined by the judge or justice of the peace after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.

[15] * * * A search warrant shall not issue but upon probable cause in connection with one specific offense to be determined by the judge or justice of the peace after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and persons or things to be seized.

No search warrant shall issue for more than one specific offense. (Sec. 3, Rule 126.)

one specific offense." Not satisfied with this qualification, the Court added thereto a paragraph, directing that "no search warrant shall issue for more than *one* specific offense."

The grave violation of the Constitution made in the application for the contested search warrants was compounded by the description therein made of the effects to be searched for and seized, to wit:

> "Books of accounts, financial records, vouchers, journals, correspondence, receipts, ledgers, portfolios, credit journals, typewriters, and other documents and/or papers showing all business transactions including disbursement receipts, balance sheets and related profit and loss statements."

Thus, the warrants authorized the search for and seizure of records pertaining to *all business transactions* of petitioners herein, regardless of whether the transactions were *legal* or *illegal*. The warrants sanctioned the seizure of *all* records of the petitioners and the aforementioned corporations, whatever their nature, thus openly contravening the explicit command of our Bill of Rights—that the things to be seized be *particularly* described—as well as tending to defeat its major objective: the elimination of *general* warrants.

Relying upon Moncado v. People's Court (80 Phil. 1), Respondent-Prosecutors maintain that, even if the searches and seizures under consideration were unconstitutional, the documents, papers and things thus seized are admissible in evidence against petitioners herein. Upon mature deliberation, however, we are unanimously of the opinion that the position taken in the Moncado case must be abandoned. Said position was in line with the American common law rule, that the criminal should not be allowed to go free merely "because the constable has blundered," [16]

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[16] People v. Defore, 140 NE 585.

upon the theory that the constitutional prohibition against unreasonable seraches and seizures is protected by means other than the exclusion of evidence unlawfully obtained,[17] such as the common-law action for damages against the searching officer, against the party who procured the issuance of the search warrant and against those assisting in the execution of an illegal search, their criminal punishment, resistance, without liability to an unlawful seizure, and such other legal remedies as may be provided by other laws.

However, most common law jurisdictions have already given up this approach and eventually adopted the exclusionary rule, realizing that this is *the only practical means of enforcing the constitutional injunction* against unreasonable searches and seizures. In the language of Judge Learned Hand:

> "As we understand it, the reason for the exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In earlier times the action of trespass against the offending official may have been protection enough; but that is true no longer. Only in case the prosecution which itself controls the seizing officials, knows that *it cannot profit by their wrong, will that wrong be repressed.*"[18]

In fact, over thirty (30) years before, the Federal Supreme Court had already declared:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his rights to be secure against such

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[17] Wolf v. Colorado, 93 L. ed. 1782.

[18] Pugliese (1945) 153 F. 2d 497.

searches and seizures, is *of no value,* and, so far as those thus placed are concerned, might as well be stricken from the Constitution: *The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."* [19]

This view was, not only reiterated, but also, broadened in subsequent decisions of the same Federal Court.[20] After reviewing previous decisions thereon, said Court held, in Mapp v. Ohio (*supra*):

"* * * Today we once again examine the Wolf's constitutional documentation of the right of privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State court.

"Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth,

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[19] Weeks v. United States (1914) 232 US 383, 58 L. ed. 652, 34 S. Ct. 341; italics supplied.

[20] Gouled v. United States (1921) 255 US 298, 65 L. ed. 647, 41 S. Ct. 261; Olmstead v. United States (1928) 277 US 438, 72 L. ed. 944, 48 S. Ct. 564; Wolf v. Colorado, 338 US 25, 93 L. ed. 1782, 69 S. Ct. 1359; Elkins v. United States, 364 US 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437 (1960); Mapp v. Ohio (1961), 367 US 643, 6 L. ed. 2d 1091, 81 S. Ct. 1684.

it is enforceable against them by the same sanction of exclusion as it used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, *without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to permit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'* At the time that the Court held in Wolf that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even Wolf 'stoutly adhered' to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the Boyd, Weeks and Silverthorne Cases. Therefore, in extending the substantive protection of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf Case. In short, *the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.* Only last year

the Court itself recognized that *the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'* * * *

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore constitutional in origin, *we can no longer permit that right to remain an empty promise.* Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, *we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.*" (Italics ours.)

Indeed, the non-exclusionary rule is contrary, not only to the letter, but, also, to spirit of the constitutional injunction against unreasonable searches and seizures. To be sure, if the applicant for a search warrant has competent evidence to establish probable cause of the commission of a given crime by the party against whom the warrant is intended, then there is no reason why the applicant should not comply with the requirements of the fundamental law. Upon the other hand, if he has no such competent evidence, then it is *not possible* for the judge to find that there is probable cause, and, hence, no justification for the

issuance of the warrant. The only possible explanation (not justification) for its issuance is the necessity of *fishing* evidence of the commission of a crime. But, then, this fishing expedition is indicative of the absence of evidence to establish a probable cause.

Moreover, the theory that the criminal prosecution of those who secure an illegal search warrant and/or make unreasonable searches or seizures would suffice to protect the constitutional guarantee under consideration, overlooks the fact that violations thereof are, in general, committed by agents of the party in power, for, certainly, those belonging to the minority could not possibly abuse a power they do not have. Regardless of the handicap under which the minority usually—but, understandably—finds itself in prosecuting agents of the majority, one must not lose sight of the fact that the psychological and moral effect of the possibility[21] of securing their conviction, is watered down by the pardoning power of the party for whose benefits the illegality had been committed.

In their Motion for Reconsideration and Amendment of the Resolution of this Court dated June 29, 1962, petitioners allege that Rooms Nos. 81 and 91 of Carmen Apartments, House No. 2008, Dewey Boulevard, House No. 1436, Colorado Street, and Room No. 304 of the Army-Navy Club, should be included among the premises considered in said Resolution as residences of herein petitioners, Harry S. Stonehill, Robert P. Brooks, John J. Brooks and Karl Beck, respectively, and that, furthermore, the records, papers and other effects seized in the offices of the corporations above referred to include personal belongings of said petitioners and other effects under their exclusive possession and control, for the exclusion of which they have a standing under

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[21] Even if remote.

the latest rulings of the federal courts of the United States.[22]

We note, however, that petitioners' theory, regarding their alleged possession of and control over the aforementioned records, papers and effects, and the alleged "personal" nature thereof, has been advanced, *not* in their petition or amended petition herein, but in the Motion for Reconsideration and Amendment of the Resolution of June 29, 1962. In other words, said theory would appear to be a readjustment of that followed in said petitions, to suit the approach intimated in the Resolution sought to be reconsidered and amended. Then, too, some of the affidavits or copies of alleged affidavits attached to said motion for reconsideration, or submitted in support thereof, contain either inconsistent allegations, or allegations inconsistent with the theory now advanced by petitioners herein.

Upon the other hand, we are not satisfied that the allegations of said petitions and motion for reconsideration, and the contents of the aforementioned affidavits and other papers submitted in support of said motion, have sufficiently established the facts or conditions contemplated in the cases relied upon by the petitioners, to warrant application of the views therein expressed, should we agree thereto. At any rate, we do not deem it necessary to express our opinion thereon, it being best to leave the matter open for determination in appropriate cases in the future.

We hold, therefore, that the doctrine adopted in the Moncado case must be, as it is hereby, abandoned; that the warrants for the search of three (3) residences of herein petitioners, as specified in the Resolution of June 29, 1962, are null and void; that the searches and seizures therein

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[22] Particularly, Jones v. U.S., 302 U.S. 257; Alioto v. Republic, 216 Fed. Supp. 48; U.S. v. Jeffries, 72 S. Ct. 93; Villano v. U.S., 300 Fed. 2d 680; and Henzel v. U.S., 296 Fed. 2d 650.

made are illegal; that the writ of preliminary injunction heretofore issued, in connection with the documents, papers and other effects thus seized in said residences of herein petitioners is hereby made permanent; that the writs prayed for are granted, insofar as the documents, papers and other effects so seized in the aforementioned residences are concerned; that the aforementioned motion for Reconsideration and Amendment should be, as it is hereby, denied; and that the petition herein is dismissed and the writs prayed for denied, as regards the documents, papers and other effects seized in the twenty-nine (29) places, offices and other premises enumerated in the same Resolution, without special pronouncement as to costs.

IT IS SO ORDERED.

ROBERTO CONCEPCION
Roberto Concepcion
Chief Justice

WE CONCUR:

JOSE B. L. REYES
Jose B. L. Reyes
Associate Justice

ARSENIO P. DIZON
Arsenio P. Dizon
Associate Justice

QUERUBE C. MAHALINTAL
Querube C. Mahalintal
Associate Justice

JOSE P. BENZGON
Jose P. Benzgon
Associate Justice

CALIXTO O. ZALDIVAR
Calixto O. Zaldivar
Associate Justice

CONRADO V. SANCHEZ
Conrado V. Sanchez
Associate Justice

J. Castro concurred and dissented in a separate opinion.

FRED RUIZ CASTRO
Associate Justice

/hon*

A True Copy:

Signature illegible
Deputy Clerk of Court
Supreme Court

G.R. No. L-19550

STONEHILL, ET AL., *Petitioners*

v.

DIOKNO, ET AL., *Respondents*.

Concurring and Dissenting Opinion

CASTRO, *J.*:

From my analysis of the opinion written by Chief Justice Roberto Concepcion and from the import of the deliberations of the Court on this case, I gather the following distinct conclusions:

1. *All* the search warrants served by the National Bureau of Investigation in this case are general warrants and are therefore proscribed by, and in violation of, paragraph 3 of section 1 of Article III (Bill of Rights) of the Constitution;

2. *All* the searches and seizures conducted under the authority of the said search warrants were consequently illegal;

3. The non-exclusionary rule enunciated in *Moncado* v. *People,* 80 Phil. 1, should be, and is declared, abandoned;

4. The search warrants served at the three residences of the petitioners are *expressly* declared null and void; the searches and seizures therein made are *expressly* declared illegal; and the writ of preliminary injunction heretofore issued against the use of the documents, papers and effects seized in the said residences is made permanent; and

5. Reasoning that the petitioners have not in their pleadings satisfactorily demonstrated that they have legal standing to move for the suppression of the documents, papers and effects seized in the places other than the three residences adverted to above, the opinion written by the Chief Justice *refrains* from *expressly* declaring as null and void

the search warrants served at such other places and as illegal the searches and seizures made therein, and leaves "the matter open for determination in appropriate cases in the future".

It is precisely the position taken by the Chief Justice summarized in the immediately preceding paragraph (numbered 5) with which I am not in accord.

I do not share his reluctance or unwillingness to expressly declare, at this time, the nullity of the search warrants served at places other than the three residences, and the illegality of the searches and seizures conducted under the authority thereof. In my view even the exacerbating passions and prejudices inordinately generated by the environmental political and moral developments of this case should not deter this Court from forthrightly laying down the law—not only for this case but as well for future cases and future generations. *All* the search warrants, without exception, in this case are admittedly general, blanket and roving warrants and are therefore admittedly and indisputably outlawed by the Constitution; and the searches and seizures made were therefore unlawful. That the petitioners, let us assume *in gratia argumenti,* have no legal standing to ask for the suppression of the papers, things and effects seized from places other than their residences, to my mind, cannot in any manner affect, alter or otherwise modify the intrinsic nullity of the search warrants and the intrinsic illegality of the searches and seizures made thereunder. Whether or not the petitioners possess legal standing, the said warrants are void and remain void, and the searches and seizures were illegal and remain illegal. No inference can be drawn from the words of the Constitution that "legal standing" or the lack of it is a determinant of the nullity or validity of a search warrant or of the lawfulness or illegality of a search or seizure.

On the question of legal standing, I am of the conviction that, upon the pleadings submitted to this Court, the peti-

tioners have the requisite legal standing to move for the suppression and return of the documents, papers and effects that were seized from places other than their family residences.

Our constitutional provision on searches and seizures was derived almost *verbatim* from the Fourth Amendment to the United States Constitution. In the many years of judicial construction and interpretation of the said constitutional provision, our courts have invariably regarded as doctrinal the pronouncements made on the Fourth Amendment by federal courts, especially the Federal Supreme Court and the Federal Circuit Courts of Appeals.

The U.S. doctrines and pertinent cases on standing to move for the suppression or return of documents, papers and effects which are the fruits of an unlawful search and seizure, may be summarized as follows: (a) ownership of documents, papers and effects gives "standing"; (b) ownership and/or control or possession—actual or constructive—of premises searched gives "standing"; and (c) the "aggrieved person" doctrine where the search warrant and the sworn application for search warrant are "primarily" directed solely and exclusively against the "aggrieved person", gives "standing".

An examination of the search warrants in this case will readily show that, excepting three, all were directed against the petitioners personally. In some of them, the petitioners were named personally, followed by the designation, "the President and/or General Manager" of the particular corporation. The three warrants excepted named three corporate defendants. But the "office/house/warehouse/premises" mentioned in the said three warrants were also the same "office/house/warehouse/premises" declared to be owned by or under the control of the petitioners in all the other search warrants directed against the petitioners and/or "the President and/or General Manager" of the particular corporation. (see pages 5-24 of Petitioners' Re-

ply of April 2, 1962). The searches and seizures were to be made, and were actually made, in the "office/house/warehouse/premises" owned by or under the control of the petitioners.

Ownership of matters seized gives "standing".

Ownership of the properties seized alone entitles the petitioners to bring a motion to return and suppress, and gives them standing as persons aggrieved by an unlawful search and seizure regardless of their location at the time of seizure. *Jones* v. *United States,* 362 U.S. 257, 261 (1960) (narcotics stored in the apartment of a friend of the defendant); *Henzel* v. *United States,* 296 F. 2d 650, 652-53 (5th Cir. 1961) (personal and corporate papers of corporation of which the defendant was president); *United States* v. *Jeffers,* 342 U.S. 48 (1951) (narcotics seized in an apartment not belonging to the defendant); *Pislow* v. *United States,* 8 F. 2d 492, 493 (9th Cir. 1925) (books seized from the defendant's sister but belonging to the defendant); Cf. *Villano* v. *United States,* 310 F. 2d 680, 683 (10th Cir. 1962) (papers seized in desk neither owned by nor in exclusive possession of the defendant).

In a very recent case (decided by the U.S. Supreme Court on December 12, 1966), it was held that under the constitutional provision against unlawful searches and seizures, a person places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile:

> "Where the argument falls is in its misapprehension of the fundamental nature and scope of Fourth Amendment protection. What the Fourth Amendment protects is the security a man relies upon when he *places himself or his property within a constitutionally protected area, be it his home, or his office, his hotel room or his automobile.* There he is protected from unwarranted governmental intrusion. And when he

puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in *Jeffers,* the purloining of the petitioner's private papers in *Gouled,* or the surreptitious electronic surveillance in *Silverman.* Countless other cases which have come to this Court over the years have involved a myriad of differing factual contexts in which the protections of the Fourth Amendment have been appropriately invoked. No doubt the future will bring countless others. By nothing we say here do we either foresee or foreclose factual situations to which the Fourth Amendment may be applicable." (*Hoffa* v. *U. S.* 87 S. Ct. 408 (December 12, 1966) See also *U. S.* v. *Jeffers,* 342 U.S. 48, 72 S. Ct. 93 (November 13, 1951). (emphasis supplied)

Control of premises searched gives "standing".

Independent of ownership or other personal interest in the records and documents seized, the petitioners have standing to move for return and suppression by virtue of their proprietary or leasehold interest in many of the premises searched. These proprietary and leasehold interests have been sufficiently set forth in their motion for reconsideration and need not be recounted here, except to emphasize that the petitioners paid rent, directly or indirectly, for practically all the premises searched (Room 91, 84 Carmen Apts.; Room 304, Army & Navy Club; Premises 2008, Dewey Boulevard; 1436 Colorado Street); maintained personal offices within the corporate offices (IBMS, USTC); had made improvements or furnished such offices; or had paid for the filing cabinets in which the papers were stored (Room 204, Army & Navy Club); and individually, or through their respective spouses, owned the controlling

stock of the corporations involved. The petitioners' proprietary interest in most, if not all, of the premises searched therefore independently gives them standing to move for the return and suppression of the books, papers and effects seized therefrom.

In *Jones* v. *United States, supra,* the U.S. Supreme Court delineated the nature and extent of the interest in the searched premises necessary to maintain a motion to suppress. After reviewing what it considered to be the unduly technical standards of the then prevailing circuit court decisions, the Supreme Court said (362 U.S. 266):

> "We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of those distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest,' often only of gossamer strength, ought not be determinative in fashioning procedures ultimately referable to constitutional safeguards." See also *Chapman* v. *United States,* 354 U.S. 610, 616-17 (1961).

It has never been held that a person with requisite interest in the premises searched must own the property seized in order to have standing in a motion to return and suppress. In *Alioto* v. *United States,* 216 F. Supp. 48

(1963), a bookkeeper for several corporations from whose apartment the corporate records were seized successfully moved for their return. In *United States* v. *Antonelli Fireworks Co.*, 53 F. Supp. 870, 873 (W. D. N. Y. 1943), the corporation's president successfully moved for the return and suppression as to him of both personal and corporate documents seized from his home during the course of an illegal search:

> "The *lawful possession* by Antonelli of documents and property, *either his own or the corporation's,* was entitled to protection against unreasonable search and seizure. Under the circumstances in the case at bar, the search and seizure were unreasonable and unlawful. The motion for the return of seized articles and the suppression of the evidence so obtained should be granted." (emphasis supplied)

Time was when only a person who had property interest in either the place searched or the articles seized had the necessary standing to invoke the protection of the exclusionary rule. But in *MacDonald* v. *United States,* 335 U.S. 461 (1948), Justice Robert Jackson, joined by Justice Felix Frankfurter, advanced the view that "even a guest may expect the shelter of the rooftree he is under against criminal intrusion". This view finally became the official view of the U.S. Supreme Court and was articulated in *United States* v. *Jeffers,* 342 U.S. 48 (1951). Nine years later, in 1960, in *Jones* v. *United States,* 362 U.S. 257, 267, the U.S. Supreme Court went a step further. Jones was a mere guest in the apartment unlawfully searched, but the Court nonetheless declared that the exclusionary rule protected him as well. The concept of "person aggrieved by an unlawful search and seizure" was enlarged to include "anyone legitimately on premises where the search occurs".

Shortly after the U.S. Supreme Court's *Jones* decision, the U.S. Court of Appeals for the Fifth Circuit held that

the defendant organizer, sole stockholder and president of a corporation had standing in a mail fraud prosecution against him to demand the return and suppression of corporate property. *Henzel* v. *United States,* 296 F. 2d 650, 652 (5th Cir. 1961), *supra.* The court concluded that the defendant had standing on two independent grounds: *First*—he had a sufficient interest in the *property* seized, and *second*—he had an adequate interest in the *premises* searched (just like in *the case at bar*). A postal inspector had unlawfully searched the corporation's premises and had seized most of the corporation's books and records. Looking to *Jones,* the court observed:

> "*Jones* clearly tells us, therefore, what is not required to qualify one as a 'person aggrieved by an unlawful search and seizure.' It tells us that appellant should not have been precluded from objecting to the Postal Inspector's search and seizure of the corporation's books and records merely because the appellant did not show ownership or possession of the books and records or a substantial possessory interest in the invaded premises . . ." *Henzel* v. *United States,* 296 F. 2d at 651.

Henzel was soon followed by *Villano* v. *United States,* 310 F. 2d 680, 683 (10th Cir. 1962). In *Villano,* police officers seized two notebooks from a desk in the defendant's place of employment; the defendant did not claim ownership of either; he asserted that several employees (including himself) used the notebooks. The Court held that the employee had a protected interest and that there also was an invasion of privacy. Both *Henzel* and *Villano* considered also the fact that the search and seizure were "directed at" the moving defendant. *Henzel* v. *United States,* 296 F. 2d at 682; *Villano* v. *United States,* 310 F. 2d at 683.

In a case in which an attorney closed his law office, placed his files in storage and went to Puerto Rico, the Court of

Appeals for the Eighth Circuit recognized his standing to move to quash as unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution a grand jury subpoena *duces tecum* directed to the custodian of his files. The Government contended that the petitioner had no standing because the books and papers were physically in the possession of the custodian, and because the subpoena was directed against the custodian. The court rejected the contention, holding that

> "Schwimmer legally had such possession, control and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third-party naked possessor to produce and deliver them." *Schwimmer* v. *United States*, 232 F. 2d 855, 861 (8th Cir. 1956).

Aggrieved person doctrine where the search warrant is primarily directed against said person gives "standing".

The latest United States decision squarely in point is *United States* v. *Birrell*, 242 F. Supp. 191 (1965, U.S.D.C., S.D.N.Y.). The defendant had stored with an attorney certain files and papers, which attorney, by the name of Dunn, was not, at the time of the seizing of the records, Birrell's attorney.* Dunn, in turn, had stored most of the records at his home in the country and on a farm which, according to Dunn's affidavit, was under his (Dunn's) "control and management". The papers turned out to be private, personal and business papers together with corporate books and records of certain unnamed corporations in which Birrell did not even claim ownership. (All of these type records were seized in the case at bar). Nevertheless, the

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* Attorney-client relationship played no part in the decision of the case.

search in Birrell was held invalid by the court which held that even though Birrell did not own the premises where the records were stored, he had "standing" to move for the return of *all* the papers and properties seized. The court, relying on *Jones* v. *U.S., supra; U.S.* v. *Antonelli Fireworks Co.*, 53 F. Supp. 870, aff'd 166 F. 2d 631; *Henzel* v. *U.S., supra;* and *Schwimmer* v. *U.S., supra,* pointed out that

> "It is overwhelmingly established that the searches here in question were directed solely and exclusively against Birrell. The only person suggested in the papers as having violated the law was Birrell. The first search warrant described the records as having been used 'in committing a violation of Title 18, United States Code, Section 1341, by the use of the mails by one Lowell M. Birrell, . . .' The second search warrant was captioned: 'United States of America v. Lowell M. Birrell." (p. 198)
>
> "Possession (actual or constructive), no less than ownership, gives standing to move to suppress. Such was the rule even before Jones." (p. 199)
>
> "If, as thus indicated, Birrell had at least constructive possession of the records stored with Dunn, it matters not whether he had any interest in the premises searched." See also *Jeffers* v. *United States,* 88 U.S. Appl. D.C. 58, 187 F. 2d 498 (1950), affirmed 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 459 (1951).

The ruling in the *Birrell* case was reaffirmed on motion for reargument; the United States did not appeal from this decision. The factual situation in *Birrell* is strikingly similar to the case of the present petitioners; as in *Birrell,* many personal and corporate papers were seized from premises not petitioners' family residences; as in *Birrell,* the searches were "PRIMARILY DIRECTED SOLELY AND EXCLUSIVELY" against the petitioners. Still both types of

documents were suppressed in *Birrell* because of the illegal search. In the case at bar, the petitioners' connection with the premises raided is much closer than in *Birrell.*

Thus, the petitioners have full standing to move for the quashing of all the warrants regardless of whether these were directed against residences in the narrow sense of the word, as long as the documents were personal papers of the petitioners or (to the extent that they were corporate papers) were held by them in a personal capacity or under their personal control.

Prescinding from the foregoing, this Court, at all events, should order the return to the petitioners all *personal* and *private* papers and effects seized, no matter where these were seized, whether from their residences or corporate offices or any other place or places. The *uncontradicted* sworn statements of the petitioners in their various pleadings submitted to this Court indisputably show that amongst the things seized from the corporate offices and other places were *personal* and *private* papers and effects belonging to the petitioners.

If there should be any categorization of the documents, papers and things which were the objects of the unlawful searches and seizures, I submit that the grouping should be: (a) *personal* or *private* papers of the petitioners wherever they were unlawfully seized, be it their family residences, offices, warehouses and/or premises owned and/or controlled and/or possessed (actually or constructively) by them as shown in all the search warrants and in the sworn applications filed in securing the void search warrants, and (b) purely *corporate* papers belonging to corporations. Under such categorization or grouping, the determination of which unlawfully seized papers, documents and things are *personal/private* of the petitioners or *purely corporate papers* will have to be left to the lower courts which issued the void search warrants in ultimately effecting the suppression and/or return of the said documents.

And as unequivocally indicated by the authorities above cited, the petitioners likewise have clear legal standing to move for the suppression of *purely corporate* papers as "President and/or General Manager" of the corporations involved as specifically mentioned in the void search warrants.

Finally, I must articulate my persuasion that although the cases cited in my disquisition were criminal prosecutions, the great clauses of the constitutional proscription on illegal searches and seizures do not withhold the mantle of their protection from cases not criminal in origin or nature.

FRED RUIZ CASTRO

A True Copy

Signature illegible
Deputy Clerk of Court
Supreme Court

APPENDIX C

EXHIBIT E

OFFICE MEMORANDUM
UNITED STATES GOVERNMENT

Dated: January 10, 1962

To: Office of International Operations, Washington, CP:10:E

From: Revenue Service Representative, CP:10:MA:RLC

Subject: Harry Stonehill

Yesterday I was visited by Howard L. Parsons, Economic Counsellor for the Embassy, as the result of decisions reached in a preceding discussion he had with Minister Mein (there is no ambassador in residence at the moment). Last week the FBI agent arranged for the Stonehill informant to talk with Parsons and although Parsons stated that the information was generally known to them, the informant was able to supply details and put the entire picture into focus.

Parsons stated in the opinion of the Embassy it is imperative for American interests in the Philippines that some way be found to get Stonehill out of the Philippines and break his stranglehold here. The reasons for their concern were known to me, although I did not concern my December memorandum with details on the areas not of direct interest to Internal Revenue; nor will I burden the memo with these details. In general, however, Stonehill has had an evil and corrupt influence on the Philippine government in the past and has now indicated that he will manipulate the new administration in the Philippines even more visciously (sic). Whereas the American government is vitally interested in developing and improving the democracy and economy of the Philippines, it appears that Stonehill's individual influence may be sufficient to under-

mine the entire American effort and perhaps destroy democracy here and the cost to the United States will be immeasurable and much beyond the hundreds of millions involved in the aid programs and loans.

I told Parsons in the Embassy that we are interested in and will conduct an investigation of Stonehill; that I personally thought the case had an excellent potential but that it was extremely complex and beyond our immediate capacity and this office had recommended that agents be sent to Manila specifically to undertake this examination. I pointed out that it was not easy for you to comply with that recommendation and since you confront with varying degrees of priorities for many pending matters as well as the problem of availability of agents qualified for this type of assignment.

I also stated, that having extracted all we could from the informant, there was nothing further this office could do at this moment and that if the Department of State had an interest in the case they should arrange to discuss it with you in Washington. Parsons was further advised that I doubted whether even the maximum effort IRS could utilize would accomplish what the Embassy wants, which is not only to get Stonehill out of the Philippines but to keep him out, and thereby permanently eliminate his corruption of the local government.

The Department of State is undoubtedly receiving a number of reports and recommendations on Stonehill. As a matter of fact, the informant first contacted the Consul General, who took a statement from him and discussed it with the Minister before it was referred to FBI. Thus, several elements in the Embassy are already thoroughly familiar with the informant's information and many of them are aware of the rest. The only attack that can be made on Stonehill is through IRS. It is therefore possible that State Department or possibly Justice may be seeking discussions with you on this case in the near future.

As you know, this office has long been of the opinion that voluntary compliance in the Far East is highly unsatisfactory. We badly need publicized case action to create an effective and necessary enforcement image. Cases which we have forwarded and suggested for this purpose in the past have not received this action and for one reason or another they have not met requirements. Stonehill's case is another and possibly the best case for this purpose too. However, if you are not in a position to assign highly qualified and fraud experienced agents to this exclusively, it would be better to take no action rather than any half way measures. Although I am convinced that the potential exists, the case is going to be really tough to work successfully.

U.S. Tobacco Co. – Picture Folder

(1) No comment

(3) Motor Pool, no significance

(3) No comment

(4) Goodyear Bldg. – John Brooks – Confidential episode in separate small adjoining bldg. This is bldg. from which John Brooks conducts steps at night

(5) (6) No Comment

(7) enlarged No 4 – etc.

(8) Entrance to John Brooks office & Secretary's Office
To be taken up at a later date – possible change before second bldg. – Section Slotting Machines & Evening News Reporters night

second bldg. Slotting Machines area

(12) Loading Dock – entrance to Slotting Machine area

(13) Plain view from lower portion – entry of newspaper into area of cigarette paper – mouth piece

(17) (18) (19) (20) No comment – but check for filter tanks, filled from

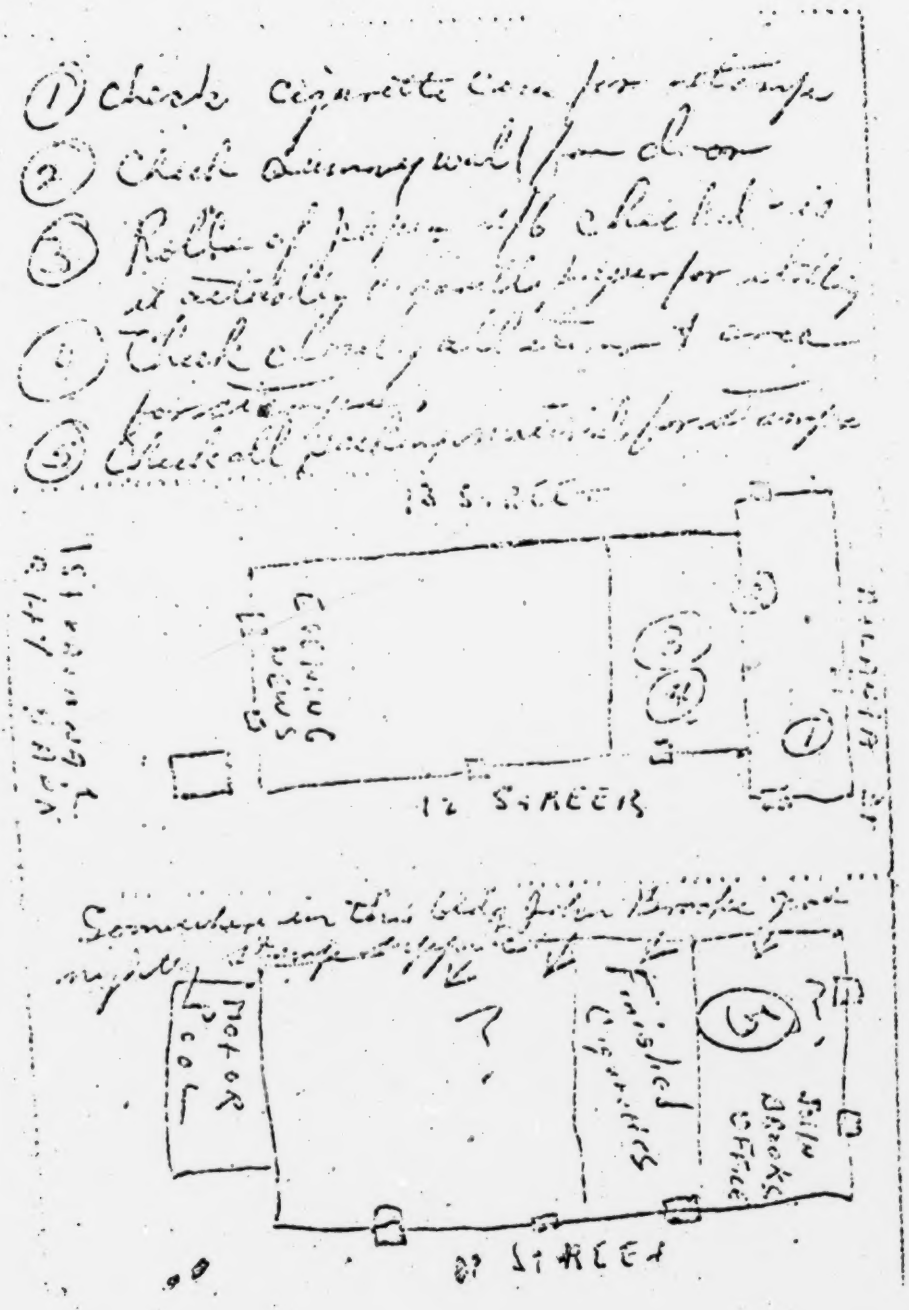
(1) Check cigarette can for stamps
(2) Check Lunch wall for door
(3) Roll of paper + file check to
(4) Check closet, all doors + over
(5) Check all pockets with for stamps
13 STREET
12 STREETS
Somewhere in this block John Brooks
Finished Cigarettes
John Brooks Office
Motor Room
87 STREET

EXHIBIT J

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352-392—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1351

HARRY S. STONEHILL AND ROBERT P. BROOKS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 31a–42a) is reported at 274 F. Supp. 420, and the opinion of the court of appeals (Pet. 1a–30a) is reported at 405 F. 2d 738.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968 (Pet. 1a–2a), and a petition for rehearing was denied on February 4, 1969 (Pet. 2). The petition for a writ of certiorari was filed on May 2, 1969, invoking this Court's jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether copies of financial records must be excluded from evidence in a civil tax proceeding in a federal court on the ground that the original documents were obtained in a foreign country by foreign officials in violation of foreign law and under circumstances that would have violated the Fourth Amendment if the searches had been conducted by United States officials.

2. Whether, on the facts of this case, United States officials instigated or participated in the foreign searches to such an extent as to make them, in effect, searches subject to the Fourth Amendment and the exclusionary rule.

STATEMENT

The United States instituted this action against Harry S. Stonehill and Robert P. Brooks, petitioners before this Court, to foreclose tax liens and collect federal income tax assessments for $13,613,721 and $11,182,966, respectively, for the years 1958 through 1961 (Pet. 1a, 36a). During the tax years in question, the taxpayers resided in the Philippines where the tax investigation leading up to the assessments involved had its inception (Pet. 3a). In the initial stages of the tax investigation, a substantial amount of evidence, consisting of business records of the taxpayers and of various corporations of which they were officers and stockholders, was obtained from the Philippine National Bureau of Investigation.[1] The NBI had secured these documents in March 1962 by raids upon the

[1] Hereinafter, NBI.

offices of the taxpayers and at least 16 Philippine corporations (Pet. 46a). In a suit for declaratory and injunctive relief, the Supreme Court of the Philippines has ruled that the raids on the taxpayers' residences were illegal because the applications for search warrants and the warrants themselves lacked the requisite specificity under Philippine law (which is adopted in this regard from American law); the Philippine court held, however, that the taxpayers had no standing to question the legality of the raids upon the various corporations (Pet. 45a–60a).

In the present lien foreclosure proceeding, the taxpayers moved the district court to suppress the evidence obtained from the NBI on the ground that United States officials had improperly participated in the raids in violation of their constitutional rights under the Fourth Amendment. (Pet. 2a, 3a.) This issue was severed and made the subject of a hearing lasting from June 12 to June 23, 1967 (Tr. 5, 1117).[2] The district court found that no United States officials had either instigated or participated in the raids by the Philippine officials. Concluding that the Fourth Amendment and the exclusionary rule employed to enforce it do not apply to searches and seizures conducted solely by foreign officials, the court denied the motion. (Pet. 42a.) On an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (Pet. 1a–2a, 43a), the court of appeals affirmed, one judge dissenting (Pet. 1a–30a).

[2] "Tr." references are to the Trial Transcript.

ARGUMENT

This proceeding raises two related questions. As to the first, the court below correctly ruled that the policies underlying the exclusionary rule for evidence unconstitutionally obtained by federal or state officers are not pertinent to the admissibility of relevant and probative evidence secured abroad by foreign officials for their own purposes. This decision is in accord with the conclusion reached by the only other circuit that has considered the issue (the Fifth Circuit, speaking through Judge Friendly) and follows an earlier decision of the court below—both of which cases this Court declined to review; since there is no indication the question is a frequently recurring one, further review is not warranted. Nor is there any reason for further review of the other question posed by this case, whether the two courts below properly found on this record that the activities of United States revenue agents did not constitute improper instigation of or participation in the searches by foreign officials.

1. The exclusionary rule, designed to enforce the Fourth Amendment by removing any incentive for an unreasonable search, does not extend to evidence secured by foreign authorities in a foreign country, where the evidence is untainted by misconduct by American officials.

In *Weeks* v. *United States,* 232 U.S. 383, the Court held that evidence illegally seized by federal officers in violation of the Fourth Amendment could not be used in a federal criminal prosecution. The Court noted, however, that evidence seized by *state* agents acting on their own account could be utilized

in a federal criminal prosecution because the Fourth Amendment was not directed to the misconduct of the state officers. 232 U.S. at 398; see, also, *Elkins* v. *United States,* 364 U.S. 206, 210. Evidence obtained in an illegal state raid would be excluded from a federal criminal prosecution only if federal officials substantially participated in the search and seizure, *Byars* v. *United States,* 273 U.S. 28; *Lustig* v. *United States,* 338 U.S. 74, or if the state officials conducted the raid not for their own purposes but on behalf of federal agents pursuant to a tacit agreement or understanding, *Gambino* v. *United States,* 275 U.S. 310. For similar reasons, evidence turned over to the federal government by a private citizen who had obtained it illegally has long been held admissible in a federal criminal prosecution because the Fourth Amendment does not apply to such misconduct. *Burdeau* v. *McDowell,* 256 U.S. 465.

Although this Court subsequently extended the application of the exclusionary rule—in *Elkins, supra,* to evidence received by federal officials on a "silver platter" from state agents, and in *Mapp* v. *Ohio,* 367 U.S. 643, to evidence seized by state agents and used in state prosecutions—the underlying premise remained as in *Weeks.* In *Elkins,* the Court said that the exclusionary "rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it" (364 U.S. at 217). See, also, *Mapp, supra,* 367 U.S. at 648–650, 655–656. And in denying *Mapp* retroactive application the Court once more noted

that the "prime purpose" for the exclusionary rule is the enforcement of the dictates of the Fourth Amendment through "the only effective deterrent to lawless police action." *Linkletter* v. *Walker,* 381 U.S. 618, 636.

Neither the terms nor the rationale of either *Mapp* or *Elkins* supports any extension of the exclusionary rule to searches and seizures not conducted by federal or state authorities. Thus, we believe, the Fourth Amendment and its sanction still remain inapplicable to seizures by private persons as in *Burdeau* v. *McDowell, supra.* In the instant case, the federal officials received the evidence in question from Philippine officials. Since the Fourth Amendment has no possible application to the actions of officials of foreign governments acting on their own account in their own territory, the Philippine officials in question occupied essentially the same status as did the private citizen in *Burdeau* v. *McDowell.* And in addition, there is not the slightest reason to believe that *foreign* police officers have any incentive to conduct their official investigations according to standards that will permit the use of their fruits in American courts. Thus, the basic deterrent purpose of the exclusionary rule would not be served by granting the relief sought in this case.[3]

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[3] The additional factor involved in *Elkins*—the "imperative of judicial integrity" (364 U.S. at 222)—rested on the principle that the federal courts should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold" (364 U.S. at 223). That principle, however, is plainly not implicated in the case of a search by foreign officials not subject to our Constitution.

For these reasons, the three appellate decisions that have considered the question have concurred in holding that, absent direct involvement or participation by American agents, any relevant and probative evidence obtained by foreign officials in a foreign country is admissible, whether or not seized lawfully under foreign or American law. See, in addition to the decision below, *Brulay* v. *United States,* 383 F. 2d 345 (C.A. 9), certiorari denied, 389 U.S. 986; and *Birdsell* v. *United States,* 346 F. 2d 775 (C.A. 5), certiorari denied, 382 U.S. 963.[4] As Judge Friendly, sitting by designation, explained for the Fifth Circuit in *Birdsell,* the principle that the United States is bound by the Constitution wherever it acts is simply not relevant "to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials were present and cooperated to some degree" (346 F. 2d at 782). And exclusion of such evidence would be required under the broader requirement that federal justice be administered fairly only "where federal officials had induced foreign police to engage in conduct that shocked the conscience [of] a federal court"; in such circumstances a federal court "might * * * refuse to allow the prosecution to enjoy the fruits of such action" (346 F. 2d at 782, n. 10).

In considering what might be the non-Fourth Amendment requirements for the fair administration

[4] The *Brulay* and *Birdsell* cases involved the use in a federal criminal prosecution of evidence obtained from Mexican officials who in turn obtained the evidence in searches and seizures which would have been illegal under the Fourth Amendment if conducted by federal officials.

of justice in the federal courts, it is important to recognize that this is not a "quasi-criminal" case, as petitioners contend (Pet. 34), but a civil case. *Helvering* v. *Mitchell,* 303 U.S. 391, 398–405. It is yet an open question whether the Fourth Amendment's exclusionary rule applies to civil trials, see *Cleary* v. *Bolger,* 371 U.S. 392, 403, 413 (concurring and dissenting opinions), other than forfeiture proceedings which require proof of a criminal offense and which clearly involve penalties for criminal offenses. See *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 700–702; *Boyd* v. *United States,* 116 U.S. 616, 638. Thus, even if there were some reason to exclude the evidence involved in this case from a criminal proceeding, it by no means follows that the tax collection authorities should be prevented from making any use of it. The effect of such a ruling would simply be to penalize the United States—and in effect the taxpaying public—by denying the opportunity to collect the nearly $25,000,000 in back taxes assessed against petitioners, merely because officials of another nation engaged in an unreasonable search that uncovered documents relevant to petitioners tax liability.[5]

2. The other question involved in this case is the factual one whether the activities of American revenue agents in the Philippines constituted such instigation of or participation in the raids that they

[5] As we noted *supra,* p. 3, the Philippine Supreme Court held petitioners without standing to challenge many of the seizures. Their standing to seek suppression of the corporate documents was not passed on below (see Pet. 2a, n. 2).

became also an American enterprise for purposes of the Fourth Amendment and the exclusionary rule.

Both courts below recognized that if federal agents were substantially involved in the conduct of the searches and seizures the Fourth Amendment would be applicable (Pet. 8a–9a, 39a). See *Byars* v. *United States,* 273 U.S. 28; *Lustig* v. *United States,* 338 U.S. 74. This factual issue of participation was severed from the other issues and tried separately at a lengthy hearing. On the voluminous record compiled at the hearing, both the district court (Pet. 38a–39a, 42a) and the court of appeals (Pet. 7a, 14a–15a) found that federal officials had neither instigated nor participated in the searches and seizures. Petitioners' Statement of the Case (Pet. 5–15) is the result of a painstaking gleaning of the record for a version of the facts which is most favorable to their cause, but it is contrary to the findings below.

This Court has long taken the view that it will not and should not review the correctness of the concurrent findings of fact of two lower courts, in the absence of a very obvious and exceptional showing of error. See, *e.g., Berenyi* v. *District Director, Immigration and Naturalization Service,* 385 U.S. 630, 635–636; *Corn Products Co.* v. *Commissioner,* 350 U.S. 46, 50–51. That sound principle applies to this case and militates against further review. But because petitioners have isolated various passages of testimony in order to suggest that the findings below were erroneous, we consider it appropriate to set forth in some detail the evidence showing that the findings of the lower courts are amply supported.

The petitioner-taxpayers, Harry S. Stonehill and Robert P. Brooks, are American citizens who engaged in business together in the Philippines after World War II and amassed a complex of at least 16 corporations (Pet. 2a, 46a). In August of 1960, Stonehill's 1958 federal income tax return was sent for audit to Robert Chandler, who was attached to the United States Embassy in Manila, Republic of the Philippines, as the Internal Revenue Service Representative for the Far East (Tr. 70–71, 81; Pet. 3a).[6] Chandler initially advised his office that this audit could not be undertaken until additional agents were assigned to his office (Tr. 81–85; Deft. Ex. A; Pet. 3a). Thereafter, nothing was done with respect to any audit of the taxpayers until December of 1961, when Menhart Spielman, a former vice-president of United States Tobacco Corporation, a company owned and controlled by the taxpayers, contacted Chandler and Robert Hawley, a Federal Bureau of Investigation agent attached to the American Embassy in Manila (Pltf. Ex. 11, p. 1; Tr. 96–97, 70–71; Pet. 3a).

Spielman alleged that the taxpayers were involved in various illegal activities and turned over approximately 100 documents to Hawley and Chandler (Tr. 110, 1203; Pltf. Ex. 11, pp. 3–4; Pet. 3a). Chandler

[6] Chandler's duties included liaison work with various foreign government agencies in his territory as well as auditing returns and collecting taxes from American taxpayers residing in his territory (Tr. 76–77, 439; Pet. 3a). These duties included liaison work with the NBI, through which he met and became friendly with José Lukban, Acting Director of the NBI (Tr. 71–72). Chandler did not have the authority to initiate a fraud investigation; only a Special Agent for the Internal Revenue Service could initiate such an investigation (Tr. 439).

concluded that Spielman's information indicated possible tax liabilities, and on December 22, 1961, he so advised his headquarters in Washington, D.C. (Pltf. Ex. 11; Pet. 3a). He also advised Washington, however, that any tax investigation was beyond his office's capabilities and recommended that a team of agents be assigned to the matter (Pltf. Ex. 11; Pet. 3a).

In the course of continued meetings, Chandler did nothing but collect information from Spielman (Tr. 112–128). He continued to ask his headquarters in Washington for help (Tr. 129–130; Pet. 3a; Deft. Exs. E, F), and even stated that it would be better not to undertake this tax investigation than to attempt it with an inadequate staff (Deft. Ex. E).[7]

As of February 13, 1962, it still had not been decided whether or not to assign personnel to conduct this tax audit (Deft. Ex. F). From December 18, 1961, the date on which Mr. Chandler met the informer Spielman, until March 3, 1962, the date of the raids by the Philippine authorities, Mr. Chandler was not assigned, nor did he assign, the investigation of the taxpayers' liabilities (Tr. 468–469, 1179).

At the first meetings between Chandler and Spielman, Spielman expressed a fear for his personal

[7] The taxpayers contend that the memorandum of January 10, 1962, from Chandler to his office (Pet. 74a–76a) conclusively shows that the Philippine searches and seizures were the result of an official United States government decision and policy. A reading of this document merely shows that Chandler advised his office of the United States Embassy's opinion of the unfortunate effects petitioners' activities had had on Philippine affairs.

safety (Tr. 141, 472). FBI agent Hawley tried for some time to persuade Spielman to turn over his information to Colonel Lukban, Director of the Philippine NBI, since the information concerned violations of Philippine laws and since the Philippine authorities could give Spielman the protection he sought (Tr. 1101–1102, 1205, 1210–1213). Finally, Spielman was persuaded to relate his information to Colonel Lukban on January 27, 1962 (Tr. 465, 1203–1205, 1210–1213; Pet. 4a).

This, however, was not the beginning of the Philippine law enforcement authorities' concern about petitioners' activities. Between Christmas of 1961 and the first week of January of 1962, Colonel Lukban informed Chandler he was aware that Chandler had some information about Stonehill, and he requested it; Chandler, however, refused to divulge any information because of the informant's desire for anonymity (Tr. 463–465, 1101, 1204). José Diokno, who was the Philippine Secretary of Justice at the time of the raids, testified in a deposition [8] that the raids in question were made *solely* for the purpose of furthering a Philippine investigation which had begun years earlier, long before Chandler first met Spielman (Pltf. Ex. 12, pp. 14, 38, 52, 145; Pet. 4a).[9]

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[8] Petitioners stipulated that this 182-page deposition could be received in evidence at the hearing if its use were limited to this case (Tr. 1200–1201).

[9] Petitioners contend (Pet. 9) that prior to Spielman's meeting with Colonel Lukban, there was no investigation by Philippine authorities concerning them. They rely on a statement of Chandler's (Tr. 143) that when Colonel Lukban heard Spielman's story, Lukban stated that "* * * he would investigate it." As used in this sentence, however, "it" refers to Spielman's

After Spielman's first introduction to Colonel Lukban of the NBI, they met a number of times in February 1962 (Tr. 146). At Spielman's request these meetings took place at Chandler's house (Tr. 148) because Spielman refused to be seen entering the NBI headquarters and Colonel Lukban felt that meetings at the United States Embassy were not appropriate (Tr. 139–141, 471–472). Chandler consented to this use of his house (Tr. 472) because of his friendship with Colonel Lukban (Tr. 72). Secretary Diokno further explained that Colonel Lukban was trying to keep Spielman's movements and whereabouts secret (Pltf. Ex. 12, p. 22).[10] In addition, Chandler did not even attend all of the meetings held at his house (Tr. 997–998) and he described those meetings at which he was present as basically between Spielman and the NBI (Tr. 149, 998).[11]

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story not to the taxpayers, as petitioners imply in their brief by truncating the quote to read: "he would investigate * * *" Petitioner's statement in this matter completely ignores the testimony of Secretary Diokno. Petitioners also overlook the fact that Colonel Lukban took the initiative in contacting Chandler to inquire what information he had about Stonehill, before Lukban even met Spielman (Tr. 463–465, 1101, 1204).

[10] Spielman had already received one severe beating and feared for his life (Pltf. Ex. 11; p. 3).

[11] There is no foundation for petitioners' contentions that at these meetings Chandler advised the NBI personnel as to the type of financial records in which he had an interest (Pet. 10). For these contentions they cite the testimony of Chandler (Tr. 316) and Major Del Rosario, an aide to Secretary Diokno (Tr. 847, 848). Chandler admitted describing to the NBI the various financial documents that would interest him (Tr. 316), but he clearly and unequivocally testified that he did this *after* the raids (Tr. 321–327). The testimony of Major Del Rosario on behalf of the taxpayers was thoroughly impeached on

Also at the beginning of February of 1962, Secretary Diokno met with Chandler and Hawley to ascertain what interest the United States had in the petitioners and their activities (Tr. 979).[12] Shortly thereafter, Secretary Diokno requested Hawley to help arrange a meeting with the then Attorney General of the United States, Robert F. Kennedy, who

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cross-examination, when he admitted that when he was introduced to Chandler, he did not know what the Stonehill case was about or what his duties, if any, were to be with respect to liaison with Chandler (Tr. 887); he first placed his initial meeting with Chandler in March of 1962 (at most two days prior to the March 3d raids) (Tr. 887). Later, he testified he met Chandler several times prior to the raids (Tr. 845, 846, 891), but these "meetings" occurred when Chandler brought Spielman to see Secretary Diokno, at Spielman's or Diokno's request, not at Chandler's house, but at the Philippine Department of Justice (Tr. 891–893), and while both Chandler and Del Rosario were waiting in an outer office for Spielman and Secretary Diokno to finish talking in an inner office (Tr. 913–914). Finally, Del Rosario admitted he never heard anyone promise to give any seized documents to Chandler (Tr. 922–924). He also admitted that his and the Philippine authorities' main interest was in investigating Philippine crimes (Tr. 901), and that, while Secretary Diokno may have told him as late as March 2d about the raids on March 3d (Tr. 894), he did not see Chandler on March 2 (Tr. 848–851).

Secretary Diokno testified that he first advised Del Rosario of the Stonehill investigation on March 2 (the day before the raid) and gave him no other information at that time (Pltf. Ex. 12, pp. 37–43, 115). Diokno testified that he did not ask Del Rosario to help in the investigation because of the need for secrecy and because Del Rosario possibly had some social contacts with petitioners (Pltf. Ex. 12, pp. 97–100).

[12] Diokno testified that this inquiry was made because the two persons being investigated were American citizens and he wanted to be sure that the United States was not going to intervene to stop the investigation after he had committed himself (Pltf. Ex. 12, pp. 155–156).

was making a tour of the Far East; in response Chandler gave Diokno the name of the Hong Kong police official in charge of security for Attorney General Kennedy's party in Hong Kong (Pltf. Ex. 12, pp. 60–63). Secretary Diokno flew to Hong Kong and saw a Mr. Seigenthaler, one of the Attorney General's aides, on February 11, 1962 (Pltf. Ex. 12, pp. 24–25; Deft. Ex. AZ). At this meeting, Secretary Diokno requested American help in investigating petitioners, specifically, that the United States furnish tobacco experts for investigation of the activities of the petitioners' Philippine tobacco companies (Pltf. Ex. 12, pp. 25–26, 61–62). No one at that meeting asked Secretary Diokno to assist the United States in any investigation (Pltf. Ex. 12, pp. 25–26, 44), and Chandler at no time made such a request (Pltf. Ex. 12, p. 44). Further, Secretary Diokno admitted that the help he sought from the United States was never provided (Pltf. Ex. 12, pp. 26, 169).

Around the time of this Hong Kong trip, Secretary Diokno decided that petitioners should be arrested and their companies' business premises raided in connection with the NBI's investigation (Pltf. Ex. 12, pp. 26–34). When Chandler learned of this decision, he requested that no such action be taken until personnel from the Internal Revenue Service had an opportunity to evaluate the tax problems (Tr. 986). This request was disregarded, however, and the raids were conducted on March 3, 1962, prior to the arrival five days later of Special Agent Sterling Powers, who was to be in charge of the United States tax investigation

(Tr. 468–469, 1179).[13] After this decision by Secretary Diokno, and in advance of the raids, Chandler did endeavor to secure from Colonel Lukban permission to see records seized in the raids (Tr. 989).

On the night of March 2, 1962, Chandler was contacted by an aide of Colonel Lukban who requested that he visit Lukban at his home (Tr. 1006). Upon arriving, Chandler found a large number of NBI personnel there, speaking the Tagalog language (Tr. 1006–1007). The NBI agents were standing around drinking soft drinks (Tr. 1007), and the gathering appeared social in nature (Tr. 305–306). At this time, a Mr. Nocon started (or resumed) typing (Tr. 1007) and Colonel Lukban showed or read to Chandler a document that he described as a warrant, soliciting Chandler's comments (Tr. 306, 1007). Chandler testified that he did not know anything about warrants, did not even know what kind of warrant it was, never having seen any before, and quickly replied that it looked all right to him (Tr. 1007, 306–313).[14]

Chandler stated that he did not compose or draft the warrants or the applications for the warrants (Tr.

[13] In his direct examination by petitioners' counsel Del Rosario testified that the raids were postponed to March 3d because federal agents who were to help Chandler had not arrived from the United States (Tr. 843–844); on cross-examination, however, he admitted that he had previously testified that the raids had been postponed because tobacco experts requested by Secretary Diokno had not been furnished by the United States (Tr. 898–900).

[14] At the hearing, Chandler was shown one of the search warrants and the application therefor which were used in the raids, but he stated that this was not the type of thing shown to him at Colonel Lukban's on March 2d (Tr. 1007–1008, 1010–

315–316), and that they must have been prepared even before he arrived (Tr. 319). He did not know how many warrants there were or how many or what premises were going to be raided (Tr. 1010). Thus, his casual remark that the papers shown to him looked all right cannot be elevated to meaningful participation in the planning for the raids.

Although Chandler, while he was at Lukban's house, overheard some of the NBI personnel make references to the forthcoming raids, he did not answer any questions of the NBI team leaders concerning the raids (Tr. 308–309); he neither gave advice nor made any requests to Colonel Lukban concerning the raids (Tr. 1009).[15] Chandler was present at Colonel Luk-

1011). Chandler's comment on the document simply identified as a warrant can only be taken for what it was, a passing remark on something about which Chandler had no knowledge and did not hold himself out to have, since he was not a special agent with the training or responsibility for criminal investigations.

[15] Chandler admitted that, out of curiosity, he asked Mr. Nocon if the room rented by Karl Beck at the Army-Navy Club was included in the places to be raided; when Mr. Nocon said "No", Chandler said he thought any raids should include those premises (Tr. 1009–1010, 317–318). Chandler stated that he made this comment because of what the informer Spielman had told the NBI and him (Tr. 319). This was not an order or directive or even addressed to Secretary Diokno or Colonel Lukban, the men who decided on the raids and planned them (Pltf. Ex. 12, p. 52; Tr. 902). It was but a reminder to a lower echelon NBI employee of what the informer Spielman had already told them. This remark did not even involve premises in the names of the taxpayers but rather concerned a room rented in the Army-Navy Club under the name of Karl Beck (Tr. 695), an executive of the Industrial Business Management Corporation (Tr. 666), which was one of the Philippine corporations being investigated by the Philippine authorities for violations

ban's house on the night of March 2, 1962, for not more than 30 minutes (Tr. 1008). Chandler emphatically denied that he dictated or gave any written instructions to any NBI personnel (Tr. 328–330) or otherwise participated in the planning of the raids (Tr. 320). He swore that the only aid he ever gave the Philippine officials at any time was the relaying of information from Spielman to them (Tr. 320).[16]

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of Philippine law (Pet. 46a). There is nothing to show that this reminder by Chandler had any specific connection to any United States investigation. Hence, this incident cannot be determined, at this juncture, to negate the findings of the courts below that Chandler had not been involved in planning the raids.

[16] Petitioners contend that Chandler prepared a location map (Deft. Ex. J; Pet. 78a) and detailed written instructions (Deft. Ex. I; Pet. 77a) for the conduct of the raid (Pet. 12). Defendants' Exhibit J is a diagram listed as the premises of the Goodrich Building, containing offices of the Evening News; Defendants' Exhibit I is described as detailed written instructions but actually it consists of a collection of notes arranged in numerical order, many of which are simply "no comment". Chandler freely admitted that most of the handwriting on these two exhibits was his (Tr. 349, 360–361), but that some of the handwriting on Defendants' Exhibit J appeared to be that of others and that the diagram part was not his because he had never been to the buildings drawn thereon (Tr. 360–363, 368–369, 1047). He stated that he did not remember drafting these exhibits (Tr. 351, 363, 367, 370, 373, 1048) but that he did make notes and drawings when interviewing Spielman and drafted such things at Spielman's request for the purpose of reducing Spielman's story to paper (Tr. 331, 351, 353, 356–357, 366, 368, 373, 1048–1049). Also, he stated he helped Spielman reduce his story to paper because Spielman was often misunderstood by the NBI officials (Tr. 366, 1049), as Spielman, who lived in Czechoslovakia until an adult (Pltf. Ex. 11, p. 1), and the NBI officials who spoke Tagalog among themselves (Tr. 1006–1007), spoke English with different accents (Tr. 460, 373). Chandler stated that the language in these two exhibits was Spielman's

The actual raids were simultaneously commenced by 200 NBI agents at 1:00 p.m., Saturday, March 3, 1962 (Tr. 396, 864, 906, 909), at which time petitioners

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language (Tr. 353, 356, 358), that all the information on these exhibits came from Spielman, and that he never visited or made any personal investigation of the premises described (Tr. 372–373, 1047). Further, Chandler explained that he did not give these or like papers to anyone other than Spielman (Tr. 351, 356–357, 358, 359, 1048–1049) and that he did not remember giving the exhibits to Colonel Lukban, the NBI, or Secretary Diokno (Tr. 352, 357, 1048–1049). Chandler denied that he wrote anything at all when he visited Colonel Lukban's house the night before the raids (Tr. 328–330, 1041, 1077). There is absolutely no indication, in the record, other than the hearsay suggestion made by counsel for the petitioners (Tr. 349–357), that these two exhibits were ever in the possession of the NBI.

By no stretch of the imagination can these two exhibits be characterized as instructions or directions by Chandler to the NBI or to anyone else. The only logical explanation for Defendants' Exhibit I is that it contains responses to answers from a person being interviewed. This is clearly shown by the fact that this exhibit contains 20 numbered comments apparently tied into some picture folder. Of these 20 numbered comments, 8 of them (to-wit, 1, 3, 5, 6, 17, 18, 19 and 20) contain the notation "no comment" and comments numbered 11, 12 and 13 merely state "Goodrich Bldg." These would be strange instructions to give any NBI personnel making raids. Also, the only items mentioned in these two exhibits which could be deemed to refer to evidence to be seized are references to "stamps," i.e., Philippine revenue stamps to be placed on cigarette packages made and sold by United States Tobacco Corporation, and "rolls of cigarette paper" described as "newsprint," which also pertain to the manufacture of cigarettes. (Deft. Exs. I, J.) These latter notations do not relate to any evidence germane to an American investigation, but are only pertinent to the NBI investigation into counterfeit Philippine tobacco stamps, tobacco paper smuggled into the Philippines, and cigarettes on which the Philippine excise tax was not paid (Pltf. Ex. 12, pp. 61–62; Deft. Ex. AZ).

were arrested (Tr. 908). Secretary of Justice Diokno testified that he made the decision to conduct the raids and that the NBI made all the preparations (Pltf. Ex. 12, pp. 27–40, 46–49). This testimony was corroborated by the petitioners' own witness, Major Del Rosario, who had been Secretary Diokno's aide (Tr. 901–902). Further, Secretary Diokno testified that he personally cleared this investigation with the President of the Philippines who granted permission to proceed (Pltf. Ex. 12, pp. 45–46, 93–94). Secretary Diokno also testified that these raids were not conducted for any purposes of the United States government but solely to uncover violations of Philippine law (Pltf. Ex. 12, pp. 52–53), and that he received no requests from the United States government, or from Mr. Chandler in particular, with respect to the raids (Pltf. Ex. 12, pp. 43–44).

At 1:00 p.m. on March 3, 1962, Chandler, together with two employes from his office, William Ragland [17] and a Mr. Reynolds, went to a parking lot across the street from NBI headquarters to await the conclusion of the raids and to see if they could obtain from the NBI any records which were seized (Tr. 1012–1013, 1136). They remained there or at the NBI arson squad building until approximately 10:00 p.m. without any communication with the NBI, although Chandler tried to telephone Colonel Lukban several times (Tr. 1017–1018). At approximately five o'clock

[17] Ragland was an Internal Revenue Agent who had been sent to the Philippines to work under and assist Special Agent Sterling Powers, who was to handle this tax investigation for the United States (Tr. 1183–1184). Ragland arrived in the Philippines on February 26, 1962 (Tr. 1133); Powers did not arrive until March 8, 1962 (Tr. 1179).

that afternoon, Chandler, Ragland and Reynolds had read in the evening newspaper that the taxpayers had been arrested and that various businesses with which they had been associated had been raided (Tr. 1015–1016). Finally, at about 10:00 p.m., Chandler talked to Colonel Lukban on the telephone and Colonel Lukban requested that he come over to his office (Tr. 1017–1018). The three Americans went to Colonel Lukban's office where they saw a large volume of records which, they were told, came from the raided premises (Tr. 401, 1018–1019, 1139–1140). Colonel Lukban indicated that the raids had been completed, although the NBI remained in possession of many of the raided premises (Tr. 400–401). Chandler, at this time, requested permission to copy the seized documents, but this request was refused and he was told that the documents would not be made available until after they had been examined, catalogued, and inventoried by the NBI (Tr. 1019, 1143, 425–426).

During the half-hour when Chandler, Ragland and Reynolds were present in Colonel Lukban's office, an NBI agent entered and told Colonel Lukban that he had seized a large volume of corporate records (Tr. 1142, 1144, 1019–1020) at a warehouse of the United States Tobacco Corporation but that there were too many to bring back to the NBI office; he also requested the help of an accountant to identify what records were significant (Tr. 1142–1143, 1019–1021). Colonel Lukban then asked Chandler to go to the warehouse and help the NBI agents there, and in order to retain the cooperation of the host government Chandler agreed. At the warehouse, the three Ameri-

cans found a large quantity of old corporate records in a storage area (Tr. 1019–1022, 1142–1147);[18] after pointing out an old general ledger of the corporation and some supporting books as being the more significant records for accounting purposes, they left (Tr. 1019–1022, 1146–1148). They made no detailed examination of these records; they took no records with them; they do not know what the Philippine authorities did with them, and they have never seen these old records since (Tr. 1147–1149). Further, they were at this warehouse for only one-half hour, beginning at approximately 11:00 p.m., on March 3, 1962 (Tr. 1024, 1149).

When Chandler left the warehouse, he drove to the main office of the United States Tobacco Company several blocks away. Leaving Ragland and Reynolds in his car, he approached the NBI agent in charge and asked if he had found the record storage room of which Spielman had advised both Chandler and the NBI (Tr. 1150, 1024–1025). Apparently unaware of this information, the NBI agent asked Chandler to point out that area (Tr. 1025). Chandler stepped into the office building, pointed out the general location of the record storage room and left (Tr. 1025). Chandler did not enter the storage area or examine

[18] This warehouse and the records it contained remained in the custody of the NBI for two years (Tr. 339, 404, 610–611). Further, when Chandler arrived at the warehouse, the records were no longer in their original sealed boxes but were in great disarray on the floor (Tr. 1022, 1146) and obviously had been examined by the NBI agents (Tr. 657). The taxpayers' own witness, Mrs. Zubiri, admitted that the NBI agents had broken the cartons containing these records and examined them prior to Chandler's arrival (Tr. 657–658).

any records there (Tr. 1025–1026); he was on the corporate premises for approximately five minutes (Tr. 1026).[19] Chandler, Ragland and Reynolds then went home (Tr. 1034–1035). Subsequently, the NBI team did enter the record storage area and found there stock inventory records of the United States Tobacco Corporation (Tr. 614–619).

On Sunday, March 4, 1962, Chandler again contacted Colonel Lukban and requested that he make the seized records available but again Colonel Lukban refused, saying that Chandler would have to wait until the NBI had gone over the records and inventoried them (Tr. 425–426). On Monday, March 5, 1962, Ragland and Reynolds went to the NBI headquarters and some of the seized records were made available to them for the first time; they were not, however, given free access to all of the records seized (Tr. 1153). On Thursday, March 8, 1962, Special Agent Sterling Powers, who was sent from the United States to conduct the tax investigation, arrived in Manila (Tr. 1179), and Powers and Ragland continued to inspect and copy some of the seized documents for a number of months (Tr. 1183).

Thereafter, the Philippine investigation culminated in petitioners' deportation from the Philippines.

On this record, the courts below were justified in concluding that the incidental connection of American officials negatived petitioners' contention that the

[19] Thus, these visits to the warehouse and main office of the United States Tobacco Corporation occurred at least eight hours after these premises had been seized by the NBI and also after Colonel Lukban had advised Chandler that the raids had been accomplished.

United States government was implicated in the raids planned and executed by Philippine agents, in the Philippines, to secure evidence of violations of Philippine laws. As reliably found by the courts below, the facts of this case therefore do not justify forbidding the use of copies of the seized documents in this civil tax-lien foreclosure suit.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
JOHN J. MCCARTHY,
Attorneys.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1351

HARRY S. STONEHILL and ROBERT P. BROOKS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HANS A. NATHAN
BERT B. RAND
1730 K Street, Suite 308
Washington, D.C. 20006

BERTRAM H. ROSS
606 South Olive Street
Los Angeles, Cal. 90014

JOSEPH A. BALL
120 Linden Avenue
Long Beach, Cal.

Counsel for Petitioners

Of Counsel:
JOHN L. INGOLDSBY, JR.
918 16th Street
Washington, D.C. 20006

Dated July 11, 1969

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Petitioners pray that this Court grant a rehearing of its Order of June 16, 1969, denying the petition for writ of certiorari, and that a rehearing be granted and a writ of certiorari issue.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The following substantial grounds within the provisions of Rule 58.2 which have not been previously presented, are available to the petitioners:

1. EFFECT OF THIS COURT'S DECISION IN CHIMEL V. CALIFORNIA (June 23, 1969, No. 770, October Term 1968)

A few days after denial of the petition for certiorari herein, the Court decided *Chimel v. The State of California*, No. 770, October Term, 1968. The Court found that in the absence of a search warrant there was no constitutional justification for extending a search beyond the immediate area of a legal arrest, terming "unreasonable" within the purview of the Fourth Amendment all warrantless searches going beyond narrowly defined limits. In so doing, the Court mentioned the possible abuse by police officers of any different rule, in that officers might then employ the strategy of arresting suspects at home rather than elsewhere so as to have the opportunity for roaming, warrantless searches under the pretext of such search being "incident" to a lawful arrest.

It is submitted that the rationale of *Chimel* is clearly applicable to the case at bar. Federal officers, according to the majority finding below were "casually"[1] and therefore

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[1] The events leading to and following this "casual presence" are best summarized in Judge Browning's statement of the evidence at 405 F.2d 738, 753; App. pp. 27a, 28a:

> American interest in a possible tax case against Stonehill antedated Spielman's appearance by many years. Both before and after receiving Spielman's information the local American tax agents were aware of the need for an investigation of Stonehill's tax affairs but lacked the personnel to conduct it. Assistance was requested of Washington, but was not forthcoming. Chandler and FBI Agent Hawley took Spielman to the Philippine authorities. Chandler told the Philippine authorities that he thought there was an American tax case against Stonehill, but that the evidence had to be secured. Colonel Lukban told Chandler that if Spielman's story checked out he would seek approval of an investigation by Philippine authorities. Chandler testified that in the course of meetings with Philippine authorities prior to the raids he made it clear that his interest was in appellant's tax

presumably lawfully, present during the unlawful searches conducted by Philippine raiders. The majority found that their presence did not amount to such substantial participation as to taint the entire search and exclude all the evidence obtained by them from the foreign police. However, there is no dispute that the U.S. agents themselves, beyond their "casual" presence, went afield and, as in *Chimel*, personally and physically conducted warrantless searches of their own. As Judge Browning described two of the incidents (405 F.2d at 750, 751) (Appendix to Petition for Certiorari, [hereafter referred to as App.], pp. 22a, n. 19, 23a, n. 20):

> Chandler testified that Colonel Lukban told him that an NBI agent "had run into a big area of records and he didn't know what—he was not qualified to determine what he should take and what he

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records as distinguished from those relating to bribery or political matters. When first told that the raids were contemplated, Chandler asked that they be postponed until he could obtain help from Washington. Later the raids were postponed for a week. A Philippine official testified that the reason for this postponement was that the people who were to come from the United States to help Chandler had not arrived. One of the American tax agents expected by Chandler arrived in this interval. Chandler and an FBI agent assisted in arranging a meeting in Hong Kong between the Philippine Secretary of Justice and the Executive Assistant to the Attorney General of the United States. The contemplated raids were discussed at this meeting. Upon his return to Manila, the Secretary of Justice ordered the raids to proceed. The warrants issued by the Philippine magistrates referred to possible violation of internal revenue laws, but the Philippine Bureau of Revenue had no contact with the case before the raids. In the course of the raids Chandler and his associates were requested to, and did, select and segregate significant accounting records from the mass of documents found at one of the raided premises. At Chandler's request, Colonel Lukban agreed in advance to make the seized documents available to the American agents, and in fact did so. The agents examined and copied documents over a period of about three months, initially in office space provided by the Philippine authorities.

shouldn't take, and he asked me if I would help him—if myself and the man would go down there and look at the records and see what should be taken and what should be left behind."

Chandler and the two IRS agents "wanted to cooperate with" Lukban and therefore went with an NBI agent to the premises where the records had been found. Upon arriving, the three agents did not merely point out the apparently significant books and records at the warehouse and leave, as the majority suggests. Chandler testified that for about half an hour he and his two agents "went through the records and segregated what we thought might be important, and . . . put them in a box." After placing the records in a box, the American agents "indicated to the [NBI] agent that that is all we could see was of any significance."

Having done this, the agents did not simply leave, as the majority's statement implies. The majority omits to mention that Chandler, acting on information Spielman had supplied, then examined bobbins of cigarette paper in the warehouse which he thought might be significant in the investigation.

* * *

Chandler testified that after leaving the first search location, he and his two agents went to the main office of the United States Tobacco Corp. to see whether NBI activity there was "equally disorganized." Chandler entered this building, and the NBI agent in charge there was brought to him. . . . Chandler testified that he then showed the NBI agent where the record storage room was located.

The majority omits to mention that NBI agents subsequently entered the room identified by Chandler and removed the records, and that a witness testified that Chandler accompanied the NBI agents into the room, although Chandler denied it. 405 F.2d at 750 n. 19, App. pp. 22a, 23a n. 19.

Finally, Agent Chandler, by having personally requested that the room in the Army-Navy Club be searched (274 F.

Supp. p. 422, 405 F.2d at 750), clearly constituted the Philippine raiders his agents. Any different interpretation would invite a police "strategy" leading to subterfuge by employment of private persons or foreign nationals to do the officers' dirty work. Therefore, it is submitted that with regard to (1) the records which Chandler and Ragland themselves physically searched, segregated and later had copied; (2) the storeroom records which Chandler located and had searched, and (3) the Army-Navy Club records which Chandler had searched and seized for him and which would not have been seized but for his request, the searches were "unreasonable" searches by the U.S. agents within the *Chimel* doctrine and suppression is required.

If the present record, consisting of the findings of the trial court, as supplemented by the appellate court, is insufficient for this Court to enter a final order, as Judge Browning pointed out,[2] remand to the trial court for additional findings is required.

2. GOVERNMENT DID NOT SUSTAIN ITS BURDEN OF PROOF TO SHOW THAT THE SEARCH WAS REASONABLE

Another substantial ground for rehearing, not previously presented, is that on the clear record the government did not sustain its burden of proof to show that the evidence is untainted. The standards of proof applied by both trial and appellate courts placed the burden of proof of illegality on petitioners. While petitioners submit that they have amply borne this burden, it was not theirs, for both the trial court (274 F.Supp. 420, 424) and the appellate court

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[2] "Even if this were not so, reversal would be required on a second, independent ground—the inadequacy of the trial court's findings. The majority has undertaken to fill the gaps by de novo fact-finding of its own; this an appellate court may not do. The only proper course is to remand the case to the trial court for further consideration and the entry of adequate findings." 405 F.2d at 752, App. p. 26a.

(405 F.2d at 473) have found that the raids as such were illegal under both the Philippine and the U.S. Constitution. Both the trial court and the appellate court have found and held that American agents were present during the raids and that they obtained the evidence seized in the raids. By logical application of the rule laid down first in *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266 and followed in *United States v. Wade,* 388 U.S. 218, 240; *Murphy v. Waterfront Commission,* 378 U.S. 52, 79, n. 18; *United States v. Coplon,* 185 F.2d 629, 636 (C.A. 2) cert. denied, 342 U.S. 920; *United States v. Goldstein,* 120 F.2d 485, 488 (C.A. 2), affirmed, 316 U.S. 114, the Government had the burden to convince the court that this evidence was not tainted by the illegality. This burden it did not sustain.

3. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT THE GOVERNMENT CANNOT USE EVIDENCE OBTAINED BY METHODS THAT OFFEND THE SENSE OF JUSTICE OR, AS SOMETIMES STATED, VIOLATE THE CONCEPT OF FAIR PLAY

In the leading case of *Rochin v. People of California,* 342 U.S. 165, 72 S.Ct. 205 (1952), Justice Frankfurter said, at p. 172:

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Following this statement of policy this Court found that the Fourteenth Amendment in a criminal case required a standard of fair play or, as sometimes expressed, conduct that does not shock conscience. This concept is equally applicable to the instant case.

This entire case and the search and seizures involved sprang (aside from the unilateral, and unsupported, belief of some U.S. Embassy officials in Manila that petitioner Stonehill was an "evil" influence in the Philippines) from Internal Revenue Agent Chandler's longstanding "opinion

that voluntary compliance [with U.S. tax laws] in the Far East [was] highly unsatisfactory." He reported to his office:

> "We badly need publicized case action to create an effective and necessary enforcement image. Cases which we have forwarded and suggested for this purpose in the past have not received this action and for one reason or another they have not met requirements. Stonehill's case is another and possibly the best case for this purpose too." (App. p. 76a)

The motivation for, as well as the execution of, the raids (drawing of diagrams, directions for searches and seizures) (see App. 29a) clearly deprive petitioners of due process under the Fifth Amendment by a scheme so elaborate and shocking as to warrant the position that justice was offended and decency outraged. Any other conclusion would seem to support an argument that as a matter of expediency constitutional safeguards are suspended when a citizen leaves the borders of the United States, and that United States agents can engage in activities abroad, using foreign officials, that are specifically prohibited within the United States as regards to use of State and local officials.

Respectfully submitted,

Hans A. Nathan
Bert B. Rand
Bertram H. Ross
Joseph A. Ball

By Hans A. Nathan
Counsel for petitioners

Of Counsel:

John L. Ingoldsby, Jr.